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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1931.

THE UNITED STATES OF AMERICA,
Appellant (Petitioner),

against

GEORGE OTIS SMITH,
Appellee (Respondent).

ON CERTIFICATE FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANT.

JOHN W. DAVIS,
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Counsel for the United States Senate.

On the Brief:
CHARLES POLETTI.

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ON CERTIFICATE FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANT.

Opinion Below.

The case came before the Supreme Court of the District of Columbia on a petition for a writ of *quo warranto* filed by the United States Attorney for the District of Columbia, pursuant to the Code of the District of Columbia, Title 24, Part III, Section 232 thereof, and answer filed by the appellee thereto. The parties submitted at the argument a pamphlet entitled "Senate Precedents." This contained a list of precedents for the reconsideration by the Senate of its vote confirming or rejecting a nomination after the notification of the President of its action thereon. The Supreme Court in an opinion filed December 5, 1931, denied the petition (R. 11). The opinion is not yet reported. The pamphlet, Senate Precedents, was filed with the opinion (R. 18).

Prior to the entry of the order on the opinion the parties, by stipulation, submitted additional information concerning Presidential and Senatorial practice in cases of reconsideration of nominations. This stipulation was labelled "Agreement of Counsel in Regard to Facts Concerning Nomination, Confirmation and the Issuance of Commissions in Specific Cases, as Shown by the Senate Executive Journal, by Records of the Executive Offices of the White House, and in Certain Instances by Departmental Records," and was made a part of the record of the Court below by an order entered December 14, 1931.

Jurisdiction.

On December 22, 1931, the Supreme Court of the District of Columbia entered an order that the petition for a writ of *quo warranto* be denied with costs to be paid by the petitioner (R. 112). On the same day the appellant in open court noted an appeal to the Court of Appeals (R. 112). On December 29, 1931, the appellant filed its assignment of errors (R. 112) and the designation of the record (R. 114).

On January 22, 1932, the record was filed with the Court of Appeals and the case noted for trial at the January Term. At the same time there was filed with the Court of Appeals a stipulation by both counsel that the Clerk of the Court of Appeals, in printing the record transmitted to him by the Supreme Court, should, in lieu of printing separately the pamphlet, Senate Precedents, made a part of the record of the Supreme Court by the opinion filed therein on December 5, 1931 and the stipulation of counsel made a part of the record by order of the Supreme Court entered on December 14, 1931, print the pamphlet and stipulation as one document in the form to be prepared and submitted upon agreement to the Clerk of the Court of Appeals by both counsel. This compilation appears in the record now before this Court as Senate, White House and Departmental Precedents (R. 31-112).

Subsequently, the Court of Appeals, pursuant to Section 239 of the Judicial Code, certified a question to this Court. On February 11 the certificate was signed and filed in the Court of Appeals. On February 12 it was filed in this Court, and on February 15, a joint motion to bring up the entire record and a joint motion to advance the cause were made before this Court (R. 123). These motions were granted on February 23 (R. 137).

Question Presented.

This is a proceeding for a writ of *quo warranto* to oust and exclude the appellee from the office of member and Chairman of the Federal Power Commission on the ground that the Senate of the United States has at no time advised and consented to the appointment of the appellee to the said office.

The sole question presented upon this appeal is one of law, namely, had the Senate the power to reconsider on the next day of executive session its vote advising and consenting to the appointment of the appellee even though in the meantime the resolution of consent had been ordered sent to the President, a commission had been issued to the appellee and the oath of office had been taken by him.

The Supreme Court of the District of Columbia denied the petition for a writ of *quo warranto* holding that the Senate did not under such circumstances have the power to reconsider its advice and consent to the nomination of the appellee and subsequently to refuse to advise and consent thereto.

Senate Rules Involved.

RULE XXXVIII.

EXECUTIVE SESSION—PROCEEDINGS ON NOMINATIONS.

1. When nominations shall be made by the President of the United States to the Senate, they shall, unless otherwise ordered, be referred to appropriate commit-

tees; and the final question on every nomination shall be, "Will the Senate advise and consent to this nomination?" which question shall not be put on the same day on which the nomination is received, nor on the day on which it may be reported by a committee, unless by unanimous consent.

2. Hereafter all business in the Senate shall be transacted in open session, unless the Senate in closed session by a majority vote shall determine that a particular nomination, treaty, or other matter shall be considered in closed executive session, in which case all subsequent proceedings with respect to said nomination, treaty, or other matter shall be kept secret: *Provided,* That the injunction of secrecy as to the whole or any part of proceedings in closed executive session may be removed on motion adopted by a majority vote of the Senate in closed executive session: *Provided further,* That Rule XXXV shall apply to open executive sessions: *And provided further,* That any Senator may make public his vote in closed executive session.

Anything in the rules of the Senate inconsistent with the foregoing is hereby repealed.

3. When a nomination is confirmed or rejected, any Senator voting in the majority may move for a reconsideration on the same day on which the vote was taken, or on either of the next two days of actual Executive session of the Senate; but if a notification of the confirmation or rejection of a nomination shall have been sent to the President before the expiration of the time within which a motion to reconsider may be made, the motion to reconsider shall be accompanied by a motion to request the President to return such notification to the Senate. Any motion to reconsider the vote on a nomination may be laid on the table without prejudice to the nomination, and shall be a final disposition of such motion.

4. Nominations confirmed or rejected by the Senate shall not be returned by the Secretary to the President until the expiration of the time limited for making a motion to reconsider the same, or while a motion to reconsider is pending, unless otherwise ordered by the Senate.

5. When the Senate shall adjourn or take a recess for more than thirty days, all motions to reconsider a vote upon a nomination which has been confirmed or rejected by the Senate, which shall be pending at the time of taking such adjournment or recess, shall fall; and the Secretary shall return all such nominations to the President as confirmed or rejected by the Senate, as the case may be.

6. Nominations neither confirmed nor rejected during the session at which they are made shall not be acted upon at any succeeding session without being again made to the Senate by the President; and if the Senate shall adjourn or take a recess for more than thirty days, all nominations pending and not finally acted upon at the time of taking such adjournment or recess shall be returned by the Secretary to the President, and shall not again be considered unless they shall again be made to the Senate by the President.

RULE XXXIX.

The President Furnished With Copies of Records of Executive Sessions.

The President of the United States shall, from time to time, be furnished with an authenticated transcript of the Executive records of the Senate, but no further extract from the Executive Journal shall be furnished by the Secretary, except by special order of the Senate; and no paper, except original treaties transmitted to the Senate by the President of the United States, and finally acted upon by the Senate, shall be delivered from the office of the Secretary without an order of the Senate for that purpose.

Statement of the Case.

Congress by an act approved June 23, 1930 (46 Stat. 797) amending an act passed on June 10, 1920 (41 Stat. 1063) created and established a commission to be known as the Federal Power Commission, composed of five commissioners to be appointed by the President by and with the advice and

consent of the Senate. The Act empowers the President to designate one of the commissioners as chairman to serve as the principal executive officer of the Commission. The Act also provides that the first commissioners who are appointed under it shall continue in office for terms of one, two, three, four and five years, respectively, from June 23, 1930, the term of each commissioner to be designated by the President at the time of nomination. The principal office of the Commission shall be in the District of Columbia where its general sessions shall be held.

On December 3, 1930, the President of the United States, pursuant to the Act of June 23, 1930, transmitted to the Senate of the United States the nomination of the appellee as a member of the Federal Power Commission for the term expiring on June 22, 1935. The nomination was transmitted by letter in the customary manner. Since then this letter has at all times remained in the custody and possession of the Senate.

In accordance with the Standing Rules of the Senate, the nomination of the appellee was duly referred to the Committee on Interstate Commerce. After hearings and deliberation concerning the ability, character and qualification of the nominee for the office of member of the Federal Power Commission, the Committee favorably reported his nomination to the Senate on December 15, 1930.

On December 20, 1930, the Senate, in open executive session, undertook the consideration of the nomination. At that time the presiding officer stated the pending question as follows:

> "Shall the Senate advise and consent to the appointment of George Otis Smith, to be a member of the Federal Power Commission?"

On the question of agreeing thereto, yeas and nays were demanded by one Clarence C. Dill, a Senator from the State of Washington, and the demand being supported by one-fifth of the Senators present the roll was called, whereupon 38

Senators were found to be voted in the affirmative and 22 in the negative and 35 not voting. So it was accordingly

> "RESOLVED, That the Senate advise and consent to the appointment of the above named person to the office named agreeably to his said nomination."

Upon the announcement of the result of the vote the President *pro tempore* stated:

> "The Senate advises and consents to the nomination and the President will be notified."

Since no objection was made or further proceedings had by the Senate with reference to the consent to this appointment or to the notification of the President, the Secretary of the Senate in usual course entered upon the Executive Journal of the Senate for December 20, 1930, the following:

> "ORDERED, that the foregoing resolution of confirmation be forwarded to the President of the United States."

The Senate thereafter considered other nominations pending before it. At the end of the record of the proceedings of the executive session held on that day, the Secretary of the Senate entered the following order:

> "ORDERED, that all resolutions of confirmation this day agreed to be forwarded forthwith to the President of the United States."

The record of these proceedings is spread upon the Executive Journal of the Senate of December 20, 1930, at pages 186, 187 and 191* and also appears in the Congressional Record of December 20, 1930, at pages 1260 and 1261.

The vote of the Senate of December 20, 1930, was taken and the order to forward a copy of the resolution forthwith

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* All page references to the Executive Journal of the Third Session of the Seventy-first Congress extending from December 1, 1930, to March 4, 1931, are to the original Executive Journal of the Senate found in the office of the Secretary of the Senate.

to the President was made pursuant to and in accordance with Rules XXXVIII and XXXIX of the Standing Rules relating specifically to proceedings on nominations. These two rules are quoted in full, *supra*, at pages 3-5.

On that same day the Senate, in accordance with a concurrent resolution passed by the two Houses of Congress, adjourned until 12:00 o'clock, noon, Monday, January 5, 1931.

On Monday, December 22, 1930, the Secretary of the Senate as directed by the order of the Senate of December 20, delivered by official messenger to the President of the United States the following communication:

"IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES.

Saturday, December 20, 1930.

RESOLVED, That the Senate advise and consent to the appointment of the following named persons to the offices named agreeably to their respective nominations:

FEDERAL POWER COMMISSION.

George Otis Smith, to be a member for the term expiring June 22, 1935.

Frank R. McNinch, to be a member for the term expiring June 22, 1934.

Marcel Garsaud, to be a member for the term expiring June 22, 1932.

Attest:

(Signed) EDWIN P. THAYER
Secretary."

On the same day the President signed a commission to the appellee, purporting to appoint him a member of the Federal Power Commission and to designate him its Chairman. This Commission was then sent to the Department of State, where the seal of the United States was impressed upon it. There on the same day the commission was delivered to the appellee, who at once took the oath of office prescribed by law and undertook to assume and enter upon the discharge of the

duties of the office of member and Chairman of the Federal Power Commission. The appellee has since assumed to act as member and Chairman of the Commission.

When the Senate reconvened on January 5, 1931, it immediately went into open executive session. Thereupon one Thomas J. Walsh, a Senator from the State of Montana, who on December 20 had voted in the majority upon the question of advising and consenting to the appointment of the appellee, moved that the vote of the Senate taken on that day be reconsidered and accompanied his motion with a motion that the President be requested to return to the Senate the notification which had been transmitted to him. And on the same day the two motions were duly entered. These proceedings were taken pursuant to and in accordance with paragraph 3 of Rule XXXVIII of the Standing Rules of the Senate (*supra*, p. 4).

On January 9, the President *pro tempore*, under an agreement for unanimous consent, put to the vote of the Senate the motion which had been made and was pending for the reconsideration of the vote by which the Senate had advised and consented to the appointment of the appellee. The motion for reconsideration prevailed by the vote of yeas, 44; nays, 37, and not voting, 15. The President *pro tempore* then put to the vote of the Senate the motion, which had also been previously made and was pending, to request the President to return to the Senate the resolution which had been sent to him by the Secretary of the Senate on December 22. This motion prevailed by a similar vote. The record of these proceedings appears in the Executive Journal of the Senate of January 9, 1931, at pages 225 and 227.

On the same day, January 9, the Secretary of the Senate forwarded to the President an authenticated transcript of the resolution requesting the return of the resolution which had been sent to him on December 22, 1930. On the following day the President *pro tempore* laid before the Senate, a message from the President of the United States reading in part as follows:

"I am advised that these appointments [Draper, Garsaud and Smith] were constitutionally made, with the consent of the Senate formally communicated to me, and that the return of the documents by me and reconsideration by the Senate would be ineffective to disturb the appointees in their offices. I can not admit the power in the Senate to encroach upon the Executive functions by removal of a duly appointed executive officer under the guise of reconsideration of his nomination.

I regret that I must refuse to accede to the requests."

On January 10, Senator Thomas J. Walsh made a motion to direct the Executive Clerk of the Senate to place the name and nomination of the appellee on the Executive calendar for the action of the Senate. This motion was agreed to by vote and the President *pro tempore* so ordered. (Executive Journal of January 10, 1931, at pp. 233, 234.) On January 23, the nomination of the appellee was ordered recommitted to the Committee on Interstate Commerce for its consideration. (Executive Journal of January 23, 1931, at p. 306.) On February 3, one James Couzens, a Senator from the State of Michigan, acting on behalf of the Committee on Interstate Commerce, reported to the Senate without any recommendation the nomination of the appellee, which was then ordered to be placed on the Executive calendar for the further action of the Senate. (Executive Journal of February 3, 1931, at p. 351.)

On February 4, the name and nomination of the appellee to be a member of the Federal Power Commission was read by the Executive Clerk. The President *pro tempore* then stated the question as follows:

"Will the Senate advise and consent to the appointment of George Otis Smith to be a member of the Federal Power Commission, for a term expiring June 19, 1935?"

Upon this question 33 Senators voted in the affirmative and 40 Senators in the negative and 23 Senators did not vote. So it was accordingly,

"RESOLVED, That the Senate do not advise and consent to the appointment of George Otis Smith, to be a member of the Federal Power Commission, for a term expiring June 19, 1935."

A record of these proceedings is spread upon the Executive Journal of the Senate of February 4, 1931, at page 366. This vote of the Senate not advising and consenting to the appointment of the appellee was put and taken upon the nomination of the appellee transmitted by the President of the United States to the Senate on December 3, 1930, although the record of the proceedings of the Senate by clerical error states the expiration of the term for which the appellee had been nominated to be June 19, 1935, instead of June 22, 1935, as the fact really is. On February 7, 1931, after two days of actual executive session of the Senate had transpired since the vote not advising and consenting to the appointment of the appellee, the Secretary of the Senate delivered by messenger to the President of the United States a notice of the rejection of the nomination of the appellee.

On these facts the appellant contends that it clearly appears from the record of the proceedings of the Senate that the Senate did not advise and consent to the appointment of the appellee to the office of member of the Federal Power Commission, but on the contrary, that the Senate, by action duly and regularly taken and in accordance with its Standing Rules, refused to advise and consent to his appointment. Despite the issuance of a commission and the taking of the oath of office, the appellee has not been duly and regularly appointed to the office of member of the Federal Power Commission or duly and regularly designated as its Chairman. He has been and is at present unlawfully holding and exercising the office of member and Chairman of the Commission and claiming and assuming to be such member and Chairman.

Summary of Argument.

I. RULES XXXVIII AND XXXIX OF THE STANDING RULES OF THE SENATE BY THEIR EXPLICIT TERMS EMPOWERED THE SENATE TO ENTERTAIN A MOTION, MADE BEFORE THE EXPIRATION OF THE NEXT TWO DAYS OF ACTUAL EXECUTIVE SESSION, TO RECONSIDER ITS VOTE ADVISING AND CONSENTING TO THE APPOINTMENT OF THE APPELLEE, EVEN THOUGH THE PRESIDENT HAD BEEN FORMALLY NOTIFIED OF SUCH CONSENT.

II. IN ADOPTING RULES XXXVIII AND XXXIX THE SENATE DID NOT EXCEED THE POWER VESTED IN IT BY ARTICLE I, SECTION 5 OF THE CONSTITUTION. THE RULES ARE BINDING ON BOTH THE SENATE AND THE EXECUTIVE.

III. THE SIGNING AND DELIVERY OF A COMMISSION AND THE TAKING OF AN OATH BY THE APPELLEE CANNOT FORTIFY HIS POSITION OR SHIELD HIM FROM OUSTER.

The present procedure of the Senate relating to the confirmation or rejection of nominations is governed by Rules XXXVIII and XXXIX of the Standing Rules of the Senate. These rules in plain and unambiguous terms empowered the Senate, at any time prior to the expiration of the next two days of actual executive session, to entertain a motion to reconsider its vote advising and consenting to the appointment of the appellee even though it had previously ordered that a copy of its resolution of consent be forwarded forthwith to the President. The provisions in paragraphs 3 and 4 of Rule XXXVIII permit no other construction. A survey of the historical development of the rules of the Senate relating to reconsideration substantiates this obvious interpretation of the present rules. The existence in the Senate of this power to reconsider after notification is further confirmed by an examination of the multitudinous instances appearing in the Executive Journals of the Senate in which the President at the request of the Senate returned resolutions, both of confirmation and rejection.

The Senate in its proceedings relating to the confirmation of the appellee did not at any time waive its rules. Nor can it be properly asserted that the Senate by ordering on December 20, 1930, that a resolution be forwarded forthwith to the President intended that the President should proceed immediately to commission the appellee or that it intended that its reserved power to reconsider should be truncated by an appointment theretofore made.

The contention that the Senate had no power to reconsider pursuant to its rules unless and until the President, in compliance with the request made by the Senate on January 9, 1931, returned the notification previously sent to him is unfounded in reason or precedent. The initial order of the Senate to notify the President forthwith did not transfer the possession and control of the nomination to the President. Regardless of the whereabouts of the written notification transmitted to the President, the question remains one of the naked power of the Senate to reconsider. If the Senate expressly retained that power by its rules, the President was not justified in refusing its request to return the notification. But in any event his refusal to do so could not emasculate the Senate's power.

To apply the rules as demanded by their plain terms does not render them constitutionally obnoxious. In their enactment the Senate did not exceed the power vested in it by Article I, Section 5 of the Constitution to "determine the rules of its proceedings". The rules do not ignore constitutional restraints or violate fundamental rights. They disclose a reasonable relation to the result sought to be attained by the Senate, namely, a chance to "sleep on" any action taken by it. And neither the advantages or disadvantages nor the wisdom or folly of the rules present any matters for judicial consideration.

The rules were binding upon the Senate and the President and all other persons dealing with the Senate in the premises. Charged with knowledge of their provisions, the signing of a commission by the President prior to the expiration

of the period within which the Senate could entertain a motion to reconsider its vote had no conclusive legal effect. At that time the Senate had not finally given its advice and consent to the appointment of the appellee as required by the Constitution. In fact, while the matter was still *in fieri* the Senate voted not to advise and consent to the appointment of the appellee.

It is clear that the appellee by his own acts in accepting a commission, taking an oath of office and beginning the discharge of the duties of the office did not vest himself with any legal rights. Without a valid confirmation of his appointment by the Senate he is not entitled to act as member and Chairman of the Federal Power Commission. The Supreme Court of the District should therefore have granted the prayer of the appellant's petition and should have ousted and excluded the appellee from the office in question.

POINT I.

Rules XXXVIII and XXXIX of the Standing Rules of the Senate by their explicit terms empowered the Senate to entertain a motion, made before the expiration of the next two days of actual executive session, to reconsider its vote advising and consenting to the appointment of the appellee, even though the President had been formally notified of such consent.

In Section 2 of Article II of the Constitution it is provided that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law". In Section 3 of the same Article, the President is directed to "commission all the officers of the United States".

It appears from Section 2 that three separate and distinct steps are contemplated by the Constitution. In the first place, the President nominates the person proposed to be appointed; secondly, the Senate must advise and consent that the nominee should be so appointed, and lastly, in pursuance of the nomination and the advice and consent of the Senate, the President makes the appointment. *Marbury* v. *Madison,* 1 Cranch 137. See also Opinions of Attorney General of the United States, Vol. 4, pages 217, 219-220 and *Willoughby,* Constitution (2nd ed.), vol. 3, § 987.

The present procedure of the Senate relating to the confirmation or rejection of nominations is governed by Rules XXXVIII and XXXIX of the Standing Rules. See *supra,* at pages 3-5. In brief, Rule XXXVIII provides that the Senate shall consider all nominations in open executive session unless a majority vote shall determine that a particular nomination shall be considered in closed executive session. It is provided that each nomination, unless otherwise ordered, shall be referred to an appropriate committee which in turn shall report its recommendation to the Senate. Thereupon the Senate shall vote as to its advising and consenting to the appointment. After the Senate has voted to advise and consent to an appointment or to reject the nomination, any Senator voting in the majority may move for a reconsideration on the same day on which the vote was taken or on either of the next two days of actual executive session. The Secretary of the Senate is directed not to return to the President nominations which have been confirmed or rejected until the expiration of the time within which a motion to reconsider can be made or while a motion to reconsider is pending, unless otherwise ordered by the Senate. Notification consists of transmitting an authenticated transcript of the Executive Journal of the Senate. See Rule XXXIX. In case the Senate does so order a copy of its resolution to proceed immediately to the President, a motion to reconsider may nevertheless be made but must be accompanied by a motion requesting the President to return such resolution to the Senate.

Believing that the meaning and purpose of the existing rules of the Senate relating to the reconsideration of a vote confirming or rejecting a nomination might be better understood by reviewing their development, we presented in our brief to the Court below an historical survey of such development, dividing it into periods delimited by the days on which the rules were amended. The periods discussed *seriatim* were as follows:

I. February 25, 1790 to March 26, 1806;

II. March 26, 1806 to March 27, 1818;

III. March 27, 1818 to January 3, 1820;

IV. January 3, 1820 to April 6, 1867;

V. April 6, 1867 to March 25, 1868;

VI. March 25, 1868 to January 17, 1877;

VII. January 17, 1877 to date.

The material presented in our survey was substantially incorporated by the Court below in an appendix to its opinion (R. 25-30). The various changes in the rules are also set forth in the compilation, Senate, White House and Departmental Precedents (R. 31).

No attempt accordingly will be made in this brief to review minutely the development of the rules. In passing, however, it is interesting to note the origin of the parliamentary practice of reconsideration. While the first set of rules, consisting of nineteen short and simple rules, adopted on April 16, 1789, by the Senate, pursuant to the power which the Constitution vested in the Senate to "determine the rules of its proceedings" (Article I, Section 5), contain no reference to the reconsideration of a vote previously taken (Annals of Congress, First Congress, Gales (ed. 1834), Vol. I, pp. 20-21), the Senate on February 23, 1790, during the same session, appointed a committee "to prepare and report a rule determining in what cases a reconsideration of a vote of the Sen-

ate shall be admissible". (Annals of Congress, First Congress, op. cit. p. 949.) On February 25, 1790, the Senate adopted the report of this Committee and resolved

> "That, when a question has been once made and carried in the affirmative or negative, it shall be in order for any member of the majority to move for a reconsideration of it." (Annals of Congress, op. cit., p. 950.)

Hence it appears that the Senate's practice of reconsidering an action previously taken dates from the very inception of our Government. While in the Parliament of Great Britain the practice has never existed,* we find it at a quite early date in some of the American colonies.† It seems to be indigenous. While the practice is not mentioned in the rules and orders of the Congress of the Confederation, the record of its proceedings discloses that it was nevertheless frequently resorted to. It was at once applied in the House of Representatives, although a rule on the subject was not adopted until January 7, 1802.‡ As a matter of fact, the term "reconsideration" is found in the Constitution of the United States. There it is provided that if the President shall not approve of a law, he shall return it to the House in which it shall have originated, which shall thereupon proceed to reconsider it. (Article I, Section 7.)

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* Although the practice of reconsideration in a clear cut form has never been applied in the English Parliament, it appears, however, that Parliament has devised other means whereby it does reconsider a vote previously taken by it. (See Jefferson's *Manual of Parliamentary Procedure*, Section XLIII; Henry M. Robert, *Manual of Rules of Order for Deliberative Assemblies*, edition of 1890, p. 66, and Josef Redlich, *Procedure of the House of Commons*, Volume III, pp. 36-37.)

† See the discussion in Robert Luce, Legislative Procedure (1922), at pages 384-385.

‡ See Luther S. Cushing, Law and Practice of Legislative Assemblies (9th ed.), page 505, and Hinds, Precedents of the House of Representatives, Vol. V, § 5605.

THE ORDER OF THE SENATE THAT A RESOLUTION OF CONFIRMATION BE FORWARDED FORTHWITH TO THE PRESIDENT DID NOT PRECLUDE RECONSIDERATION BY THE SENATE WITHIN TWO DAYS OF ACTUAL EXECUTIVE SESSION NEXT SUCCEEDING THE VOTE OF CONFIRMATION.

In the debates of the Senate held on January 5, 6, 7 and 8, 1931, with reference to the reconsideration of the nomination of the appellee, there was considerable discussion as to whether the Secretary of the Senate had in fact been authorized by the Senate to forward immediately to the President a copy of the resolution adopted by the Senate on December 20, 1930, advising and consenting to the appointment of the appellee. It was there argued by some of the Senators that assent by silence to the statement of the President *pro tempore* that, "The Senate advises and consents to the nomination and the President will be notified", did not constitute an order by the Senate that the resolution should be forthwith forwarded to the President. It is not, however, the contention of the appellant in this case that the Secretary of the Senate exceeded his authority in forwarding the resolution to the President on December 22, 1930. The appellant admits that by the usual and established practice of the Senate assent by silence to such a statement by the presiding officer of the Senate constitutes an order. As has been alleged in the petition, the Executive Journal of December 20 shows that with respect to the nomination of the appellee it was ordered by the Senate "that the foregoing resolution of confirmation be forwarded to the President of the United states". Furthermore, the Executive Journal for the same day discloses that at the end of that day's deliberations in executive session it was ordered, "that all resolutions of confirmation this day agreed to be forwarded forthwith to the President of the United States" (R. 3).

But even so, the Senate by the order to transmit immediately to the President the resolution advising and consenting to the appointment of the appellee did not deprive itself of

the power to reconsider the nomination. It is apparent from an examination of paragraph 3 of Rule XXXVIII that the Senate expressly contemplated a situation in which it might reconsider a nomination although notification of its vote had by its direction already proceeded to the President. The plain and simple reading of the provisions in paragraph 3,

> "But if a notification of the confirmation or rejection of a nomination shall have been sent to the President before the expiration of the time within which a motion to reconsider may be made, the motion to reconsider shall be accompanied by a motion to request the President to return such notification to the Senate"—

permits of no other construction. The historical development of this provision substantiates the appellant's position—which may adequately and safely rest upon the naked and explicit provisions of existing Rule XXXVIII.

Although by the rule adopted on March 26, 1806, the Senate could reconsider within the three next days of actual session of the Senate any action previously taken by it, it was definitely provided that,

> "no motion for the reconsideration of any vote shall be in order after a bill, resolution, message, report, amendment, or motion upon which a vote was taken, shall have gone out of the possession of the Senate, *nor after the usual message shall have been sent from the Senate, announcing their decision*" (R. 25-26).

At that time the Standing Rules of the Senate provided that, "The President of the United States be furnished with an authenticated transcript of the executive records of the Senate, from time to time" (R. 25). On March 27, 1818, however, the Senate in executive session adopted a resolution,

> "that in future, all nominations approved, or definitely acted on by the Senate, be by the Secretary returned to the President of the United States *from day to day, as such proceedings may occur,* any rule or usage to the contrary notwithstanding" (R. 26).

It is apparent, therefore, as a result of Rule 21 of the rules of March 26, 1806, and of the resolution adopted by the Senate on March 27, 1818, that the time within which a motion for the reconsideration of a vote advising and consenting to an appointment could be made was indeed very limited. As soon as the Secretary, who was directed to return the nominations approved on the day on which the proceeding took place, returned the nomination to the President, the power to reconsider thereby terminated.

In 1830, when the rules of the Senate were substantially as just stated, a dispute arose in the Senate as to the power of the Senate to reconsider its negative vote on the nomination of Isaac Hill as Second Comptroller of the Treasury, after the resolution announcing the vote of the Senate had been forwarded to the President. At that time the Vice-President submitted the question to the determination of the Senate. The Senate by unanimous vote decided that the motion was not in order "because the President had been notified" (R. 34). Beyond a doubt the provisions of the rules as then existing supported that conclusion.

Yet despite this unanimous decision of the Senate, we find that on April 28, 1842, the Senate requested the President to return the resolution rejecting the nomination of Edmund L. Du Barry sent to him twenty-four days previous (R. 34). On May 3, the President returned the resolution and the Senate subsequently confirmed the nomination (R. 34).

On July 1, 1842, the Senate confirmed Benjamin K. Pierce and Levi Whiting (R. 34), but on July 13 the Senate rescinded its resolution and requested its return. While the Executive Journal contains no record of any action taken by the President pursuant to this request, it does indicate that on July 14 the Senate again confirmed the nominations.

Gradually the practice of reconsideration became more common. In fact, between the time of the decision of the Hill case on April 14, 1930, and the case of A. C. Fisk on March 28, 1867, the Senate requested the President to return resolutions in no less than 160 cases. A few of the requests

as in the Du Barry case followed a rejection of the nomination; the greater portion, however, were made subsequent to a vote of confirmation. And in all of these cases, other than those of John H. Goddard (R. 41) and Westley Frost (R. 46), the President apparently returned the resolution. In a few other cases the President, while returning the resolution, pointed out to the Senate that in the meantime a commission for the appointment had been signed or made out. So it was in the cases of Joseph K. Barnes (R. 39) and H. H. Heath (R. 44-45). Similarly in the Goddard and Frost cases the President informed the Senate that commissions had been issued prior to his receipt of the request of the Senate.

We shall not now discuss the conclusions the appellee draws from some of these precedents to support his contentions. That we do *infra*, at pages 49-51. But at this point we do stress that during the years between the Hill and the Fisk decisions the Senate rules definitely provided that the Senate had no power to reconsider once the notification had gone forward to the President. What happened is quite apparent. The Senate found in actual practice that it frequently desired to reconsider its vote of confirmation or rejection after the notification thereof had been sent to the President. It will be recalled that by the resolution adopted by the Senate on March 27, 1818, it was provided that the Secretary should return to the President from day to day as the proceedings occurred all nominations approved or definitely acted on by the Senate (R. 26, 33). In order to effectuate its desire the Senate adopted the practice of requesting the President to withhold the issue of a commission and return the nomination to it. The President, similarly acting outside the legal bounds imposed by the rules of the Senate, returned the resolutions. In effect, the President was voluntarily resubmitting the nomination, thereby permitting the Senate to act on it. In law it was as if the President had withdrawn a nomination prior to final action thereon by the Senate and later resubmitted the same nomination. If a commission in the meantime had been issued the President would

naturally so inform the Senate. Since the Senate retained unto itself no power under its rules to reconsider a nomination once notification had been sent to the President, let alone once a commission had been issued, it usually would not proceed to vote on the reconsideration. In short, it was an era of comity.

In the case of Joseph K. Barnes (R. 39), for instance, the Executive Journal records that the motion to reconsider was withdrawn (R. 40). In other cases, as in the nominations of John H. Goddard (R. 41) and H. H. Heath (R. 44-45), the Senate merely dropped the matter without further proceedings. It appears, however, from the record in the Journal that on at least two occasions, some Senators, perhaps overanxious to achieve reconsideration, apparently forgot the unequivocal provision in the Senate rule that its action became final once a notification had been sent to the President.

Thus, on February 23, 1867, during the administration of President Johnson, Westley Frost was confirmed (R. 46). On February 27 the Senate requested a return of its resolution. On March 2 the President transmitted to the Senate a report from the Secretary of the Treasury stating that Frost, on the day before the Senate requested return of the resolution, had qualified for his office and had received his commission with instructions to enter upon his duties at once. On April 1, nearly a month later, Senator Sherman submitted a resolution providing that the Secretary of the Treasury be requested to recall the commission issued to Frost because his confirmation was recalled before he received his commission or was sworn into office and that the President be requested to return to the Senate the notification which had been sent to him. This resolution was rejected. In other words, the Senate in its vote followed its unanimous ruling in the Hill case.

On April 3, 1867, two days after the Senate rejected the resolution presented by Senator Sherman, it had another opportunity to determine what power to reconsider it had retained under its rules. On March 28, 1867, the Senate

confirmed A. C. Fisk (R. 48). On March 30 the Senate requested a return of the resolution. The session of the Senate then terminated on March 31. On April 2 the President returned the resolution. On the next day Senator Henderson moved the Senate to proceed to consider the motion made by him on March 30 to reconsider its vote advising and consenting to the appointment of Fisk. According to the record of the Executive Journal, Senator Conkling thereupon raised a question of order. He contended that the motion to reconsider was to be deemed as having been made for the first time on April 3 because it was not in order to make the motion nor to enter it on March 30 since the nomination had passed out of the possession of the Senate. In other words, his argument was based on the decisions in the Hill case and in the Frost case, to wit: that a nomination could not be reconsidered after notification had been sent to the President. The President *pro tempore* held the point of order well taken. Senator Fessenden appealed to the Senate. The Senate upheld the decision of the Chair (R. 49).

No doubt it was as a result of these incidents that three days later on April 6, 1867, upon the motion of Senator Fessenden, the Senate made a decisive change in its standing rules governing the reconsideration of action previously taken. The change was fundamental, we repeat, although the appellee in his brief in the Court below (p. 21) states, "Changes since 1790 are really matters of detail".

By the action then taken the existing limitation upon the power of reconsideration, namely, that a vote could not be reconsidered after a bill, resolution, message, report, amendment, or motion had gone out of the possession of the Senate announcing its decision, was trimmed down by the insertion of an amendatory clause, reading, "*except a resolution confirming or rejecting a nomination by the President*". It would appear that the Court below attached little importance to what we consider a pivotal change in the rule, for in its opinion it states (R. 20):

> "The only two significant changes in the provisions of the present rules not contained in the earlier are, first, the right of the Senate to defer notification for two days and, second, the provision for a motion to request the President to return the notification."

The latter of these provisions, added at the end of the rule, read:

> "but a motion to reconsider a vote upon a nomination shall always, if the resolution announcing the decision of the Senate has been sent to the President, be accompanied by a motion requesting the President to return the same to the Senate."

On the same day, April 6, 1867, the Senate, again upon the motion of Senator Fessenden, also amended its rule relating to the return of nominations to the President. Whereas the resolution adopted on March 27, 1818, directed the Secretary to return all nominations approved "from day to day, as such proceedings may occur", the rule thereafter provided that the return should be made "on the next day after such action is had, unless otherwise ordered by the Senate" (R. 27). These changes made in the rules on April 6, 1867, read in the light of the previous rules and of the decision of the Senate in the Hill, Frost and Fisk cases, clearly evidence an intention by the Senate not to foreclose itself from the reconsideration of a nomination by the mere transmission of a resolution to the President. The purpose of the Senate is further substantiated by an examination of Rule 20 of the rules adopted on March 25, 1868 (R. 27), and Rule 74 of the rules adopted on January 17, 1877 (R. 29).

There is another provision in Rule XXXVIII which, we believe, inescapably leads to the conclusion that by its rules the Senate did not intend that its power of reconsideration should be ended by merely ordering a copy of a resolution of its vote to be forwarded to the President. By paragraph 4 of Rule XXXVIII, the Secretary is directed not to return a nomination to the President while a motion to reconsider is

pending, unless he is otherwise ordered by the Senate. In other words, if the Senate voted to advise and consent to a certain appointment, and on the same day a motion to reconsider was made, the Secretary would not transmit to the President a copy of the resolution even after the expiration of the next two days of actual executive session. Unless he were otherwise ordered by the Senate, the notification would be delayed until the motion of reconsideration had been acted upon by the Senate. Assuming, however, that while the motion to reconsider was pending, the Senate ordered the Secretary to transmit a copy of the resolution to the President, it would obviously do violence to the rule to urge that the power of the Senate to take action on the pending motion of reconsideration had thereby been lost. This would be to make a vote ordering the transmittal of the resolution identical in parliamentary effect with a negative vote on the motion to reconsider. Why should the Senate adopt this circuitous procedure calculated to kill the pending motion by indirection, when the desired result could be directly accomplished by a vote on the main question?

If additional support were necessary to establish conclusively that the Senate did not intend by its rules to preclude itself from the reconsideration of the nomination of the appellee by ordering the resolution of its vote of confirmation to be transmitted forthwith to the President, reference need only be made to the multitudinous instances appearing in the Executive Journal of the Senate since April 6, 1867, in which the Senate requested of the President the return of a resolution, either of confirmation or rejection, and in which the President did in fact return such resolution. These cases appear in the compilation of Senate, White House and Departmental Precedents (R. 31). A few of the cases relate to the reconsideration of a nomination previously rejected by the Senate, but by far the vast majority of them involve the reconsideration of previous votes advising and consenting to an appointment. Moreover, in the latter case it often appears from the record in the Executive Journal that nominations previously

confirmed were, as in the case now before this Court, subsequently rejected.

During the debates in the Senate with respect to its power to reconsider its vote advising and consenting to the appointment of this appellee, it was urged by some Senators that, although it was generally true that the Standing Rules permitted reconsideration within the next two days of actual executive session despite the fact that a resolution had gone forward to the President, the Senate had in the case at bar waived its rules. There can be no question that the Senate by unanimous consent has the power at any time to suspend its rules. It is so provided by Rule XL of the Standing Rules of the Senate.* However, we submit that the record of the proceedings of the Senate in the instant case forbids such a contention.

The Senate Executive Journal of December 20, 1930, shows that after the result of the vote of the Senate advising and consenting to the appointment of the appellee was announced, the President *pro tempore* stated:

> "The Senate advises and consents to the nomination and the President will be notified."

The record shows no further proceedings taken on this vote. The Secretary of the Senate, in the usual course, merely entered upon the Executive Journal the order, "that the foregoing resolution of confirmation be forwarded to the President of the United States". The record of the proceedings of the executive session of the Senate of December 20, 1930, also contains at the end thereof a general catch-all order to the effect, "that all resolutions of confirmation this day agreed to be forwarded forthwith to the President of the United

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* "No motion to suspend, modify, or amend any rule, or any part thereof, shall be in order, except on one day's notice in writing, specifying precisely the rule or part proposed to be suspended, modified or amended, and the purpose thereof. Any rule may be suspended without notice by the unanimous consent of the Senate, except as otherwise provided in clause 1, Rule XII."

States". It is indeed difficult to find any support in this naked record for the assertion that the Senate had waived its right to reconsider under Rule XXXVIII, Unanimous consent for the suspension of the rule can only be found, if at all, in the silent assent of the Senate to the statement of the President *pro tempore* that the President of the United States would be notified. But it is apparent that this related solely to the transmittal of the resolution to the President and in no way to the suspension of any of the provisions of Standing Rule XXXVIII. The practice of the Senate in this respect is too well settled to permit serious dispute.

THE NOTIFICATION OF THE PRESIDENT WAS NOT TANTAMOUNT TO A WARRANT TO PROCEED FORTHWITH TO ISSUE A COMMISSION, THE OPINION OF THE ATTORNEY GENERAL TO THE CONTRARY NOTWITHSTANDING.

The Attorney General in his opinion of January 10, 1931 (36 Ops. A. G. 382), advising the President of the United States as to the return of the resolution requested by the Senate on January 9, 1931, admitted that the Senate under its rules had the power to reconsider within the next two days of actual executive session its vote advising and consenting to an appointment; but then he proceeded to limit, under the guise of construction, the power which is explicitly retained by the Senate in Rule XXXVIII. His reasoning advances by the following steps: First, the transmittal of the resolution to the President could have had no conceivable purpose other than direction by the Senate to the President to proceed immediately to issue a commission; second, the President was justified in relying upon the resolution forwarded to him; and, lastly, once the President had made the appointment, the Senate no longer had the power to reconsider its vote.

The appellee in his brief in the Court below partially adopted this conception of the Attorney General. As stated in the opinion of that Court (R. 17):

"It is contended by the respondent that—

THIRD. The President upon receiving that notification was wholly justified in assuming that it was a notification sent to him to the end that he might act; that he was well within his constitutional authority when he did act and signed the commission of the respondent."

In passing, it may be noted, however, that neither the appellee in his brief or in the oral argument, nor the Court below in its opinion laid much stress upon the reasoning presented by the Attorney General. Other grounds were apparently considered by both to be of greater force. These, we examine, *infra,* at page 39 *et seq.*

The first step in the reasoning of the Attorney General is set out in his opinion of January 10, 1931, as follows:

"* * * but where the Senate orders a notification to be sent and without waiting for the expiration of the reconsideration period, some purpose must be attributed to that action. Why order immediate notification to be sent to the President unless he is expected to act upon it? The only conceivable purpose in expediting the notice is to make it possible for the President to expedite the appointment. If ordering the notification of confirmation to be sent to the President in advance of the expiration of the time allowed by the rules for reconsideration is not intended as a formal announcement and expression of the Senate's consent to an immediate appointment, the advance notification would have no purpose whatever."

The historical development of the provisions of Rule XXXVIII furnishes the answer to this contention.

In the first place, it should be constantly borne in mind that the practice of the Senate, from the beginning of our Government to June 18, 1929, has been to transact all executive business in closed session. It was only on June 18, 1929, that Rule XXXVIII of the Standing Rules of the Senate was amended so that all business should thereafter be transacted in open session unless the Senate in closed session by

a majority vote determined that a particular nomination should be considered in closed executive session (R. 30).

Prior to April 6, 1867, the rules were simpler in that, irrespective of the limited period during which the Senate could reconsider, its power to do so was *ipso facto* lost once the resolution had gone out of its possession announcing its decision. In other words, the transmittal of the resolution was made the controlling factor. As to this the Court below agreed with the appellant (R. 21). But by the amendments of 1867, the situation was completely reversed. The period within which and the conditions under which a motion to reconsider could be made were now determined solely by the expiration of the next two days of actual session. By Rule 20 of April 6, 1867 (R. 27), the time of sending a resolution to the President became subsidiary in importance and in fact immaterial in so far as its relation and effect upon the power to reconsider was concerned. The Secretary of the Senate was directed by the rules to return the nominations on the next day after the action was taken. Certainly it will not be contended that his routine transmittal on the succeeding day of the resolution of confirmation could have any effect upon the express power to reconsider. For it is clear from the rules that this did not prevent reconsideration during the second day of actual session. In other words, the power to reconsider was rendered distinct and independent of any practice of transmitting to the President a copy of a resolution.* In addition, however, it was provided by the rule that the Senate could otherwise order as to the transmittal of the resolution. Presumably it could order not to forward the notification until after the expiration of

* The divorce of the right to reconsider from the transmittal of a resolution, bill or amendment is not unusual. It also appears in the second paragraph of Rule XIII of the Standing Rules of the Senate, reading:

> "When a bill, resolution, report, amendment, order, or message upon which a vote has been taken, shall have gone out of the possession of the Senate and been communicated to the House of Representatives, the motion to reconsider shall be accompanied by a motion to request the House to return the same; which last motion shall be acted upon immediately, and without debate, and if deter-

the period within which the Senate could reconsider. Again, this would have no effect upon the power to reconsider. Nor would the Senate have so intended it. On the other hand, the Senate might have ordered its resolution sent before the next day after the action taken. Similarly it could not be said that the Senate must have intended by this to cut short its power to reconsider.

Hence under Rule 20 of April 6, 1867 there were three possible times at which a report of the action of the Senate may have been sent to the President:

1. Immediately after the vote was taken (by order of the Senate).

2. On the next day after the vote was taken (transmitted by the Secretary in regular course).

3. At the expiration of two days of actual session after the vote was taken or at any time thereafter (by order of the Senate).

Neither of these times need have coincided with the expiration of the period within which it was provided by the rule that the Senate could reconsider. The transmittal of the resolution was no longer of consequence in its effect upon the power to reconsider. The power to reconsider had now become independent of the transmittal of the notification. This independence is emphasized by the fact that although a motion to reconsider may have been made soon after taking a vote and was still pending, the Secretary in the regular course of his duties would nevertheless have transmitted to the President under the rules a copy of the resolution on the next day after the vote.

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mined in the negative shall be a final disposition of the motion to reconsider."

In the House of Representatives it is well established that a motion to reconsider may be entertained although the bill or resolution to which it applies may have gone to the other House or to the President. (Hinds, Precedents of the House of Representatives, Vol. V, §§ 5666-5668.) It has there been held that a motion to reconsider a vote was not prevented by the fact that the House had informed the Senate that it had agreed to a Senate amendment to a House bill. (Hinds, *ibid.*, § 5672.)

Rule 43, adopted on March 25, 1868, provided that the Secretary of the Senate should not return to the President nominations approved or definitely acted upon "until the expiration of the time limited for making a motion to reconsider the same, or while a motion to reconsider is pending, unless otherwise ordered by the Senate" (R. 28). This provision was retained in Rule 75 adopted on January 17, 1877 (R. 29), and is found in paragraph 4 of Rule XXXVIII. Although there exist neither committee reports nor any discussion in the Senate definitely stating the purpose of the changes made in Rule 43, it would appear that the Senate thereby intended that in the case of most nominations no resolution should go to the President until the expiration of the period within which reconsideration could be had. Yet the Senate realized that since it passed upon nominations in closed sessions, the President would have no official notice of the attitude of the Senate prior to the receipt of a resolution. It would seem, therefore, that the Senate sought to preserve in its rules the possibility of notifying the President of its attitude on a nomination before it took final action on a nomination. For instance, the receipt of such a resolution would have permitted the President to muster support for a nominee. Thereby a nominee rejected on a first vote might upon reconsideration be confirmed. Or it might have permitted the President to withdraw the nomination before the final rejection. Incidentally, the public would have no knowledge of any of the action taken by the Senate.

For a good many years after March 25, 1868, the date of the adoption of Rule 43, the Senate but rarely ordered the resolution of its vote to be forwarded to the President prior to the expiration of the reconsideration period (See R. 56, *et seq.*). Later on it appears from the Executive Journal that it became more and more a matter of custom to order the immediate notification of the President. Moreover, this development would appear most natural. Why not let the President know our attitude? Thus would the Senate reason. In fact, we are informed by the Executive Clerk of the Office of the Secretary of the Senate that during the past

ten years the practice has been to forward a resolution to the President forthwith in nearly every case. And in that period the Senate has undoubtedly passed upon thousands of nominations. But to measure the probable intent of the Senate one need only examine the cases in which the Senate reconsidered its action, arising since January 11, 1884, when the rules governing reconsideration took on their present form (R. 85). Ninety-two such cases are listed in the Precedents (R. 86-110). In seventy-four of these the Executive Journal specifically records that the Senate had ordered after the original vote that the President be notified forthwith of its action. Of the eighteen cases where this is not recorded, nine occurred as long ago as January 16, 1884 (R. 86).

In the brief filed by the Attorney General and Solicitor General as *amici curiae* in the Court below, it is stated:

> "It has been the executive practice to act forthwith on such notifications" (Br. 4).

If by acting is meant the issue of a commission, it would follow as a consequence that it has also been the practice of the President to return notifications to the Senate for its reconsideration despite the action so taken by him because since April 6, 1867, it has been the practice in all cases but two (J. C. S. Colby (R. 69) and Morris Marks (R. 74)) to return the notification when requested, and in numerous cases it appears the request for the return of the notification reached the President a good many days after the notification had been received.

Under such circumstances the argument that the Senate definitely intended that the President should act immediately loses all force. Moreover, the result of such an interpretation, if interpretation it may be called, would transform the present rules of the Senate into the rules as they existed between March 27, 1818, and April 6, 1867, when the Secretary was directed to return the nominations to the President from day to day as such proceedings occurred,

thereby foreclosing reconsideration by the Senate. And it might also be asked whether it would be similarly contended in the case of a vote not advising and consenting to the appointment of a person that the immediate forwarding of the notification should be taken by the President as a final expression by the Senate of its wish that he should at once submit to it another name, thereby preventing the Senate from reconsidering and subsequently confirming the first nomination. On what theory can it be argued that notification to the President has one significance in the case of confirmation and another in the case of rejection?

Granted that there may be unusual situations in which the Senate would desire the President to expedite the appointment as much as possible—situations in which it might consider the postponement of the appointment until the expiration of two days of executive session as unnecessary, because, in the first place, reconsideration would be unlikely, and, secondly, because the particular office demanded immediate occupancy—to meet such special cases the rules offer a special procedure. A Senator need only make a motion to reconsider and have it tabled, and the matter is then finally concluded and the Senate is *functus officio*. See paragraph 3 of Rule XXXVIII.* The President is free thereupon to

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* Rule XIII of the Standing Rules of the Senate relating to the power to reconsider all other action within the next two days of actual session after the action, contains a similar provision. It reads as follows:

> "Every motion to reconsider shall be decided by a majority vote, and may be laid on the table without affecting the question in reference to which the same is made, which shall be a final disposition of the motion."

The practice of making a motion to reconsider and tabling it is especially current in the House of Representatives. While it is there in order to move to reconsider a vote on a motion to lay on the table whether the decision be in the affirmative or in the negative, it is settled practice that a motion to reconsider may not be applied to a vote whereby the House has laid another motion to reconsider on the table. See Hinds, Precedents of the House of Representatives, Vol. V, §§ 5632-5640, and Robert Luce, Legislative Procedure (1922), page 302.

In this connection compare the provision in Rule 20 of March 26, 1868, that no motion to reconsider a vote upon a motion to reconsider shall be in order at any time (R. 27-28).

make an immediate appointment. This definite provision by the Senate of a method to meet such extraordinary cases and bring consideration to an end, excludes, we believe, any serious attempt to construe the customary procedure of ordering a transmittal of the notification before the expiration of two days of executive session as indicating an intention on the part of the Senate that the President should make an immediate appointment. Aside from all of this, the record of the proceedings of the Senate do not contain even a hint by any Senator that the appointment of this appellee should be made immediately. The Senate, in fact, knew that the Federal Power Commission as then constituted was actually operating and would continue to do so until the new commission was duly organized (46 Stat. 797).

THE PRESIDENT WAS CHARGEABLE WITH KNOWLEDGE THAT THE SENATE RETAINED ITS RIGHT TO RECONSIDER.

The second link in the reasoning of the Attorney General is that the President was justified in relying upon the resolution forwarded to him and in proceeding to the immediate issuance of the appellee's commission. We submit, however, that the President was not only not so justified, but was charged in law with knowledge that any appointment made by him on December 22, 1930, the same day on which he received a copy of the resolution of approval, was subject to be aborted by the further action of the Senate.

The President knew that the vote of the Senate advising and consenting to the appointment of the appellee was taken on December 20. This appears on the face of the resolution delivered to him by the Secretary of the Senate. See paragraph 6 of the petition (R. 3). He also knew that the Senate had recessed on the same day until January 5, 1931. Moreover, he must have known, or at any rate is legally charged with knowledge of the rules of the Senate, and these rules on their face in unequivocal terms permitted the reconsideration of a vote by the Senate within the next two days of actual executive session.

The President must also have known that his predecessors in office had often been called upon to return resolutions transmitted to them by the Senate in order to permit the Senate to reconsider its vote, and that they did return such resolutions. In fact, the Executive Journal discloses that the Senate on two occasions prior to the case before this Court requested President Hoover himself to return resolutions advising and consenting to an appointment, and that the President did so return them. These resolutions had been forwarded to him forthwith and prior to the expiration of the reconsideration period. See compilation of Senate, White House and Departmental Precedents (R. 109-110). As a matter of fact, the Attorney General in his opinion of January 10, 1931, made no pretense of contending that the President was not apprised of all these facts. Yet the President on December 22 presumably signed a commission to the appellee and sent it to the Department of State, where the seal of the United States was impressed upon it and on the same day it was delivered to the appellee upon his taking the oath of office, for we are informed by officials in the appointment office of the Department of State and in other departments that the President never signs a commission in blank.*

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* In U. S. C., Title 4, Section 5, it is provided:

> "The Secretary of State shall have the custody and charge of such seal, and shall make out and record, and shall affix the same to, all civil commissions for officers of the United States, to be appointed by the President, by and with the advice and consent of the Senate, or by the President alone. But the seal shall not be affixed to any commission before the same has been signed by the President of the United States, nor to any other instrument, without the special warrant of the President therefor."

With respect to commissions prepared by other Secretaries it is likewise provided that the seal shall not be affixed to any commission before it shall have been signed by the President. (See U. S. C., Title 5, §§ 11 and 12.)

THE POWER OF RECONSIDERATION IS NOT LOST SIMPLY BECAUSE THE PRESIDENT HAS ACTED BEFORE THE REQUEST FOR THE RETURN OF THE NOTIFICATION IS RECEIVED.

The third step in the Attorney General's reasoning is really a begging of the question. On the one hand, the Attorney General admits that the Senate is entitled to request the return of a notification and to reconsider its vote if the President has not yet acted thereon; but if the President has acted prior to the receipt of the request, the Senate is thereby rendered impotent. Here is the kernel of the opinion of the Attorney General in his own words:

> "that the request for the return of the notification will be too late if it fails to reach the President before the appointment is made. Senate practice lends weight to these conclusions."

We shall undertake to show that Senate practice does not support this view and that the Attorney General's statement to the contrary is an inadvertence. But we submit also that Rule XXXVIII itself forbids this conclusion. The contention transgresses the bounds of legal construction. It is elementary that where the provisions are plain and unambiguous, construction or interpretation is not called into play.

> *Lewis* v. *United States,* 92 U. S. 618, 621;
> *United States* v. *Rollins,* 130 U. S. 662, 670;
> *Yerke* v. *United States,* 173 U. S. 439, 442;
> *United States* v. *Ewing,* 184 U. S. 140, 149-150;
> *Comm. of Immigration* v. *Gottlieb,* 265 U. S. 310, 313.

To adopt the interpretation of the Attorney General would mean the bodily incorporation into paragraph 3 of Rule XXXVIII, after the words, "when a nomination is confirmed or rejected, any Senator voting in the majority may move for a reconsideration on the same day on which the vote was

taken, or on either of the next two days of actual executive session of the Senate", of the words "unless the President has been notified and has made the appointment". This incorporation, in its physical form, immediately renders the remaining provisions of the rule meaningless and inconsistent. One portion of the rule should not be construed to annul or destroy what has been clearly provided by another. If the rule were to be so interpreted, it is obvious that the Senate, while a motion to reconsider a nomination was pending, would in no case order a notification to be sent to the President, knowing that if the President hurriedly made the appointment it could take no further action upon the pending motion. But paragraph 4 of Rule XXXVIII definitely provides that a notification may be ordered by the Senate to be transmitted to the President although at the time a motion to reconsider is pending. If the Senate desired in such a case to make its vote final—that is by destroying the possibility of reconsideration—the natural and ordinary method of doing so would be to make a motion to table the motion to reconsider. This is explicitly provided in paragraph 3 of Rule XXXVIII.

Nor can it be argued that in the more usual case where a motion to reconsider has not as yet been made, the Senate intended to rest the finality of its action upon events beyond its own control. It is most unlikely that the Senate, which by its rules formulated the practice of reconsideration in order the better to reach a sound judgment in the confirmation of nominations submitted to it, should want to stake the loss of this valuable power upon the haste or procrastination of the President. And this is particularly so when we consider that the fundamental changes made in the rules of April 6, 1867, occurred at a time when relations between President Andrew Johnson and the Senate were exceedingly strained.

A consideration, moreover, of the practical administration of the interpretation sponsored by the Attorney General discloses that it is purely a *tour de force*. The conclusion reached by him seems to suggest that the process resolves

itself into a mere race of diligence upon the part of the President and Senate in case of a conflict of opinion—or a possible conflict of opinion between them. So long as the President is not in receipt of the Senate's request for a return of its notification, his hands are free, we are told, and any action he may take is final and irrevocable. It can make no difference, if this is the law, that a messenger is actually on his way with a request; or that the Senate has in fact voted to reconsider before the commission is signed; or even that on such reconsideration the nomination has been rejected. Indeed by the same reasoning the President, having once been notified, might wilfully hasten the appointment notwithstanding actual knowledge on his part from unofficial sources that the Senate had proceeded or was proceeding to reconsider and reverse its action. Could it be pretended that an appointment made under such circumstances was based on that advice and consent of the Senate which the Constitution contemplates?

The debates in the Senate and the very reconsideration of the nomination of the appellee disclose that the Senate believed that its power to reconsider was not destroyed by the immediate issue of a commission. In the construction of a parliamentary rule, the courts will respect the meaning which the legislative body by its action has placed upon it.

State v. *Savings Bank of New London,* 79 Conn. 141, 152; 64 Atl. 5, 9 (1906);

Witherspoon v. *State ex rel. West,* 138 Miss. 310, 326, 103 So. 134, 138 (1925);

State ex rel. Whitney v. *Buskirk,* 40 N. J. L. 463, 467 (1878);

French v. *Senate and State of California,* 146 Calif. 604, 608, 80 Pac. 1031, 1033 (1905);

Davies v. *City of Saginaw,* 87 Mich. 439, 444, 49 N. W. 667, 668 (1891);

State ex rel. West v. *Butler,* 70 Fla. 102, 120; 69 So. 771, 776 (1915);

Smith v. *Jennings*, 67 S. C. 324, 328; 45 S. E. 821, 822-23;
People ex rel. Locke v. *Common Council of the City of Rochester*, 5 Lans. (N. Y.) 11, 14-15 (1871).

As a conclusive test of the soundness of the theory of the Attorney General, it may be asked: If the notification sent the President contained an express statement that, the premises to the contrary notwithstanding, the Senate reserved the right at any time within the two succeeding days of executive session to reconsider its action, could the President foreclose the Senate from pursuing that course by the immediate issue of a commission? Yet just this qualification is attached by necessary implication to every notification sent under the current rules.

THE SENATE'S POWER TO RECONSIDER IS NOT CHECKMATED BY THE REFUSAL OF THE PRESIDENT TO RETURN THE NOTIFICATION REQUESTED BY THE SENATE.

Diverging somewhat from the reasoning of the Attorney General, the Court below struck out upon a different line. It adopted as the test of continuing power by the Senate, its "*possesion* of the subject matter" or its "*control* of the matter". Alongside phrases such as "control of the matter", "surrenders control over the transaction" and "restored control" appear the citation of the parliamentary rule stated in Jefferson's Manual (R. 19) and a discussion of the Senate rule governing the reconsideration of a bill (R. 23). And in speaking of present Standing Rule XXXVIII, the Court states:

> "The principle of possession as necessary to effective reconsideration is still recognized by the provision for a request for return of notification. The time within which the Senate must make up its mind whether or not to treat a vote of confirmation as final is still two days of actual executive session. The right within that time to part with possession by notification to the President

> is still preserved. In short, the Senate rule in its present form indicates no departure whatever from the theory which inspired the very earliest rule—namely, that parliamentary reconsideration is impossible unless the subject-matter is still within the Senate's possession" (R. 23).

This comes dangerously near if indeed it does not achieve a begging of the entire question. Nor can it be stated with certainty whether the theory adopted by the Court below is bottomed upon the fact (1) that the Senate had lost physical possession of some indispensable document or (2) that while the Senate in advising on a nomination does not act on a physical substratum the Senate by its action here had lost control of the transaction—there had been a transit of control from the legislative to the executive branch.

In support of the first hypothesis, the Court adduces Section XLIII, second paragraph, of Jefferson's Manual to the effect that,

> "If, after a vote, the *paper* on which it is passed has been parted with, there can be no reconsideration; as if a vote has been for the passage of a bill, and the bill has been sent to the other House" (R. 19).

From this the Court reasons that the Senate's power to act is born upon its obtaining possession of a certain physical substratum and dies upon its relinquishing possession thereof. Yet it is clear that the parliamentary rule of Jefferson was formulated for the process of legislation. The rule speaks of "the paper on which it is passed has been parted with". But in the process of advising and consenting to a nomination what is "the paper", it may be asked.

The President starts the process in operation by sending a letter of nomination to the Senate. If the letter of nomination is "the paper", the legislative rule of Jefferson is immediately rendered inapplicable, for the President can deprive the Senate of any power to act thereon by merely sending a letter similar to the original letter of nomination informing

the Senate that he withdraws the nomination—the original letter of nomination remaining at all times in the custody and possession of the Senate. This is admitted by the Court below (R. 22). In Standing Rule XXXIX, it is provided "that no paper, except original treaties transmitted to the Senate by the President of the United States, and finally acted upon by the Senate, shall be delivered from the office of the Secretary without an order of the Senate for that purpose" (R. 16).

Furthermore, when paragraphs 5 and 6 of Standing Rule XXXVIII come into operation, the Senate loses all power to act on a nomination. Still the original letter of nomination remains in the custody and possession of the Senate. Hence, without doubt "the paper" cannot be the letter of nomination.

It would not be contended by the appellee that though "the paper" is first the letter of nomination, once the Senate votes on a nomination, "the paper" becomes the resolution adopted. For the resolution does not exist in a physical form. But it might be contended by him that "the paper" has now become the certificate of the Secretary notifying the President of the vote of the Senate on a nomination. In his oral argument in the Court below, the appellee referred to this notification as the "reciprocal" of the letter of nomination. In other words, it may be that he will now contend that there has been the substitution of one paper for another. However, this very contention, we submit, would preclude the applicability of the parliamentary rule of Jefferson. In addition, it is clear that what is sent to the President is merely a notification of the action of the Senate. As a paper, the notification is not a requisite. If the Senate has finally confirmed a nomination, the President may or may not proceed to appoint apart from the notification. In the process of legislation, the Constitution in Section 7 of Article I emphasizes the function that the physical possession of a bill plays. The bill is presented to the President; if he approves it, he shall sign it, but if not, he shall return it, and so forth.

But in making an appointment the President does not act upon the notification as a paper.

And when a notification is returned to the Senate, is "the paper" upon which action is taken the notification or the original letter of nomination? In its opinion the Court assumes that the indispensable physical substratum is the notification. Certain it is, however, that the Senate in its vote of reconsideration does not act upon the notification. Might it be contended that there has still been another substitution?

Admitting *arguendo* the implication of the Court below that the notification which the Secretary sent to the President is "the paper", it, of course, would follow that since the notification was never returned, the Senate had no power either to make and enter a motion to reconsider on January 5, 1931, or to vote upon that motion on January 9, 1931 (R. 5). But it will be granted, we presume, that it is the practice of the Senate to make and enter a motion to reconsider while the notification is outstanding. In so doing the Senate does act. What has the action been taken upon? Not the unreturned notification; not the letter of nomination, if one adopts the theory that after a vote the paper becomes the notification; and finally not the resolution recorded in the Executive Journal.

This analysis of the process of advising and consenting to a nomination shows the utter impossibility of applying to the case before this Court parliamentary rules formulated either by Jefferson or by the Senate to govern the process of legislation. The process of advising and consenting is not legislative. It may be termed quasi-executive; in fact, it is *sui generis*.

Now, turning to the Court's theory of "transit of control" which, in contradistinction to the one just discussed, may be called the intangible theory, it becomes of no direct consequence where and in whose possession the letter of nomination or the notification might be. This theory, in our opinion, is the only one which fits the process. Yet in substance it is no different from the reasoning presented by us in the

Court below and reasserted in this Court. Whether the Senate has "control of the transaction" when the notification is in the hands of the President is reduced in its ultimate analysis to this: Did or did not the Senate retain under its rules power to reconsider even though it had ordered that the President be notified forthwith of its vote? This crucial question the Court below answered negatively. In its opinion it stated,

> "Constitutional theory, parliamentary usage, Senate rules, Senate precedents, and considerations of practical procedure alike lead to the conclusion in the instant case that when the Senate, in conformity with its own rules, unanimously ordered notice of consent to be sent to the President, it once for all surrendered its control of the matter and its right to reconsideration and left the Executive free to make a constitutional appointment" (R. 25).

According to the view taken by the Court below the Senate has no power to reconsider, whether the President receives the request for the return of the notification before or after he has issued a commission. And, moreover, even if the request were received previous to the appointment, the President would be under no legal compulsion to return the notification. But out of mere comity, just as had been the practice before April 6, 1867, the President in such a case might return the notification. On the other hand,

> "After an appointment is made by the President upon notification by the Senate of its confirmation of a nominee, the President is without authority to restore control to the Senate by a return of the resolution of notification" (R. 24).

Hence, to the Court the legal power of the Senate under its present rules is no greater than it was previous to April 6, 1867. In fact, it made bold to state that "Changes since 1790 are really matters of detail" (R. 23-24).

The Court predicates its construction in part upon the fact that,

> "There is no provision in the rule that if the request to restore possession is not complied with, the Senate may nevertheless vote a reconsideration. Nor is there any provision of the rule that such course may be taken by the Senate if, after notification, the President 'has actually appointed and his reply to the Senate so states" (R. 21).

We submit that little comfort indeed can be found in these omissions in Rule XXXVIII. Surely the Senate, intending to retain the right to reconsider despite its ordering a notification to be transmitted forthwith to the President, would not presumptuously incorporate in its rules provisions guarding against an anticipated refusal of the President to return the resolution or his disregard of the reserved power of the Senate by issuing a commission.

As a matter of fact, the power of the Senate to proceed with reconsideration in the absence of the return of the notification is not now an open question. The Senate does make and enter motions to reconsider while a notification is outstanding. The Senate's reconsideration has begun. The right of the Senate to make and enter a motion to reconsider while a notification is in the hands of the President was the issue in dispute in the Fisk case (R. 48). There Senator Conkling argued that "it was not in order to make the motion nor to enter it on March 30", and the Senate upheld him. However, when the rules were changed on April 6, 1867 (R. 27), they expressly provided for the initiation of reconsideration prior to the return of the resolution by the President. In Rule 20 it is stated that it shall be in order for any member of the majority to *move* for the reconsideration of a question but that no motion for the reconsideration shall be *in order* after a bill, resolution, message, etc., upon which the vote was taken shall have gone out of the possession of the Senate, announcing their decision, *except a resolution confirming or rejecting a nomination by the President.* In fact, it will be noted from the compilation of Senate, White House and Departmental Precedents that subsequent to the change in the rules on

April 6, 1867, it has been the practice to enter a motion to reconsider and merely to accompany that motion with a request to return the resolution of notification. Previous to the change in the rules, the usual custom had been to request the return of the resolution sent to the President.

While we concede that the parliamentary procedure of one of the Houses in case of legislation is not determinative of that utilized by the Senate in advising and consenting to a nomination, yet it is well settled practice in the House of Representatives that a motion to reconsider may be entertained although the bill or resolution to which it applies may have gone to the Senate or to the President (See Hinds, Precedents of the House of Representatives, Vol. V, §§ 5666-5668). It has also been held that the House is not precluded from voting on a motion to reconsider due to the fact that it had already informed the Senate that it agreed to a Senate amendment to one of its bills (Hinds, *ibid.* § 5672).

The House precedents cited by Hinds conclusively indicate that the Chair based its decision upon a simple and straightforward reading of the rule of the House. The fact that the bill or resolution was no longer in the possession of the House was immaterial. These precedents, we submit, are adverse to the contention of the appellee that the Senate could not here reconsider the nomination unless and until the President returned the notification.

The appellee will probably contend that in the past it has also been the practice of the Senate not to vote upon a motion to reconsider until the notification has been returned. Even so, the vote is merely a completion of the process of reconsideration, already initiated when the motion was entered. Clearly the President cannot kill the power to reconsider, once born, by his refusal to return the notification. He can no more do that than he can thwart its power by the immediate issuance of a commission as contended by the Attorney General.

The Court below offers its explanation of the changes made on April 6, 1867:

"On April 6, 1867, the Senate rule relating to reconsideration was amended. Perhaps it was questioned whether after possession had been lost, reconsideration could ever thereafter be in order under the rule, even if possession was restored by Executive action. The amendment accordingly made the letter of the rule conform to pre-existing usage by excepting nomination cases from the flat declaration that reconsideration was always out of order after loss of possesion, and added the proviso that, in nomination cases, after notification to the President, the motion to reconsider must be accompanied by a request for return" (R. 21).

We believe, however, that an examination of the Hill, Frost and Fisk cases forbids such an interpretation. Why should the Senate be concerned as to whether it could reconsider a nomination voluntarily returned to it by the President? The Senate must have realized that the President, under no obligation to make an appointment even after the Senate had given its advice and consent, could present the same nomination once more. We submit, therefore, that Rule 20 of April 6, 1867, as confirmed by the practice pursuant thereto, contemplates that a motion to reconsider can be made, entered and disposed of even while notification is outstanding in the hands of the President.

PRESIDENTIAL AND SENATORIAL PRACTICE DO NOT SUPPORT THE CONTENTION EITHER THAT THE POWER TO RECONSIDER IS TRUNCATED BY AN IMMEDIATE APPOINTMENT BY THE PRESIDENT OR THAT IT IS CHECKMATED BY HIS REFUSAL TO RETURN THE NOTIFICATION.

The Attorney General, in his opinion, stated that "Senate practice lends weight" to his conclusion that the Senate loses its power to reconsider once an appointment is made (36 Ops. A. G. 382). He did not attempt to define what is meant by the making of an appointment. The appellee, however, in his brief in the Court below, argued this point at considerable length. His understanding of the law is identical

with that of the appellant (R. 18). Nevertheless, a brief review of the principles of law will permit one better to calculate the weight that should be given to the precedents.

According to the decision in *Marbury v. Madison*, 1 Cranch 137, an appointment is complete once the President has placed his signature on the commission. Neither the impression of the seal of the United States nor the delivery of the commission to the appointee is required in order legally to make the appointment. Hence, once the President signs a valid commission an appointee can compel its delivery. Said the Chief Justice in his opinion:

> "These are the clauses of the constitution and laws of the United States, which affect this part of the case. They seem to contemplate three distinct operations:
>
> 1. The nomination. This is the sole act of the president, and is completely voluntary.
>
> 2. The appointment. This is also the act of the president, and is also a voluntary act, though it can only be performed by and with the advice and consent of the senate.
>
> 3. The commission. To grant a commission to a person appointed, might perhaps be deemed a duty enjoined by the constitution. 'He shall,' says that instrument, 'commission all the officers of the United States.'
>
> The acts of appointing to office, and commissioning the person appointed, can scarcely be considered as one and the same; since the power to perform them is given in two separate and distinct sections of the constitution. * * *
>
> *The last act to be done by the president, is the signature of the commission. He has then acted on the advice and consent of the senate to his own nomination. The time for deliberation has then passed. He has decided. His judgment, on the advice and consent of the senate concurring with his nomination, has been made, and the officer is appointed.* This appointment is evidenced by an open, unequivocal act; and being the last act required from the person making it, necessarily excludes the idea of its being, so far as it respects the appointment, an in-

choate and incomplete transaction. * * * (Italics added.)

* * * * * * *

It is therefore decidedly the opinion of the court, that when a commission has been signed by the president, the appointment is made; and that the commission is complete when the seal of the United States has been affixed to it by the secretary of state."

So in *United States* v. *Le Baron*, 19 How. 73, it was said:

"When a person has been nominated to an office by the President, confirmed by the Senate, and his commission has been signed by the President, and the seal of the United States affixed thereto, his appointment to that office is complete" (p. 78).

See also

United States v. *Bradley*, 10 Pet. 343, 364;
United States v. *Linn*, 15 Pet. 290, 313;
United States v. *Stewart*, 19 How. 79;
Glavey v. *United States*, 182 U. S. 595, 602-604.

With this definition of the meaning of appointment in mind, we turn to a discussion of the Presidential and Senatorial precedents. We submit that upon consideration they will be found to lend no support to the views advanced either by the learned Attorney General or the Court below. On the contrary, they serve to confirm the claim of power which the Senate has made.

As we have pointed out, the rules of the Senate from March 26, 1806, to April 6, 1867, provided that a motion to reconsider would not be in order after the bill, resolution, message, etc. had gone out of the possession of the Senate announcing its decision. Of course, under such a rule a President could properly refuse to return any resolution to the Senate. Nevertheless, during this period, we find the Presidents returning resolutions to the Senate in almost every requested case. See Senate, White House and Departmental Precedents (R. 34,

et seq.). The return, however, was purely voluntary. It would appear that, despite the provision of the rule, the Presidents were anxious to facilitate the Senate in exercising a sound and thorough consideration of nominations.

It was while the rules were so cast that the Senate in 1830 voted that a nomination to reconsider its refusal to vote to advise and consent to the appointment of Isaac Hill as Second Comptroller of the Treasury was not in order, after the resolution announcing the vote had been forwarded to the President (R. 34).

During the same period there occurred the cases of Joseph K. Barnes, John H. Goddard, H. H. Heath, Westley Frost and A. C. Fisk. These cases, other than that of H. H. Heath, were presented by the appellee in his brief below and referred to by the Court in its opinion, except the case of A. C. Fisk. We shall briefly discuss each of them.

On March 2, 1864, the Senate voted to advise and consent to the appointment of Joseph K. Barnes as Medical Inspector General (R. 39). On March 7, the Senate requested the President to return its resolution. In a letter, dated March 10, received by the Senate on March 15, the President returned the resolution even though a commission had not only been made out and executed but had in fact been delivered to the appointee. On March 18, Senator Johnson withdrew his motion to reconsider (R. 40). The Court below, in its opinion, states (R. 20):

> "This precedent shows that notwithstanding the flat declaration of the Senate that after loss of possession reconsideration was too late, the Senate entertained a motion to reconsider and requested the return of the resolution and then abandoned its course when informed that the President had already appointed."

True enough; but if the Court intends to imply that it is a controlling precedent in the case now before the Court, we submit the contrary—it occurred previous to the change in the rules.

On May 18, 1864, the Senate voted to advise and consent to the appointment of John H. Goddard as Justice of the Peace for Washington County, District of Columbia (R. 41). On June 7, the Senate requested the President to return the notification previously forwarded to him. On June 25, the President informed the Senate by letter that a commission had already been issued to John H. Goddard and the appointment had been perfected. He did not return the resolution. The Executive Journal records no subsequent proceedings on the nomination.

On February 1, 1867, the Senate voted to advise and consent to the appointment of H. H. Heath as Secretary of the Territory of New Mexico (R. 44). This case is not mentioned, either in the brief of the appellee below or in the opinion of the Supreme Court. On February 6, the Senate moved to request the President to return the resolution. On February 8, President Andrew Johnson returned the resolution to the Senate. At the same time he included a letter from the Secretary of State informing him that when the request of the Senate was received at the Department of State, a commission had already been made out and sent to the Executive Mansion for signature and it had never been returned. Presumably the commision had not been signed. The Executive Journal records no subsequent proceeding on this nomination. In other words, despite the return of the resolution (unlike the Goddard case) the Senate apparently took no further action. We call attention to this fact because it shows, we believe, the impossibility of deducing from mere inaction a recognition on the part of the Senate of its lack of power.

On February 23, 1867, shortly prior to the change in the Senate rule governing reconsideration, the Senate voted to advise and consent to the appointment of Westley Frost as Assessor of Internal Revenue for the Twenty-first District of Pennsylvania (R. 46). On February 27, the Senate requested the return of the resolution. In his reply of March 2, the President, without returning the resolution, enclosed a

letter of the Secretary of the Treasury informing him that Mr. Frost, prior to the receipt of the request of the Senate, had qualified for the office and received his commission with instructions to enter upon his duties at once. At the time Mr. Frost had not yet taken his oath of office. On April 1, the first day of the ensuing special session Senator Sherman submitted a resolution that the Secretary of the Treasury be requested to recall the commission issued to Mr. Frost because the confirmation was recalled before he received it or was sworn into office. This resolution was rejected, and, we admit, properly so.

On March 28, 1867, the Senate voted to advise and consent to the appointment of A. C. Fisk as Collector of Internal Revenue for the Third District of Louisiana (R. 48). On March 30, the Senate requested a return of the resolution. On April 2, that is during the succeeding session of Congress, the President returned the resolution. On the next day Senator Henderson moved to consider the motion submitted by him on March 30 to reconsider the nomination. It was objected that such a motion was not in order. The Chair sustained the point of order and the Senate subsequently sustained the decision of the Chair. Again, we admit, the Chair ruled correctly.

And finally, we agree with the Court below in stating that a study of the Senate precedents down to and including March 1867, reveals consistent action by the Senate in declining to reconsider a nomination after notification had been sent to the President (R. 21).

But as we have pointed out, the rule governing reconsideration was amended on April 6, 1867. Moreover, the changes made were fundamental. Prior thereto the Senate retained no power of consideration once a notification had been sent to the President; subsequent thereto the Senate retained power. Accordingly, only the precedents which have arisen since then are of direct significance. These precedents, we submit, show that the President has customarily returned the notifications to the Senate despite the fact that commissions had already been signed by him.

Before discussing these specific precedents which, we believe, support our understanding of the Senate rules as existing subsequent to April 6, 1867, a word should be said about the record sources. They are three: The Senate Executive Journal, records in the Executive Offices of the White House and the records of the Department concerned (R. 31). The records taken from the Senate Executive Journal are explained at page 31 of the Transcript of Record. On page 32 the records contained in the Executive Offices of the White House are explained. We wish to add, however, a description of the method of keeping those records. The entries under the headings other than "Action of Senate" or "Confirmed" and "Date of Commission" or "Commissioned"* and "Remarks" are filled in immediately after the nomination is sent to the Senate. The entry under the heading "Action of Senate" or "Confirmed" is made when the President receives the notification from the Senate of its action. The entry under the headings "Date of Commission" or "Commissioned" is made immediately after the commission is signed, if a commission is signed, and before the commission is sent out from the Executive Offices of the President. The entries under the heading "Remarks" are inserted at the appropriate time. For instance, if a request for the return of the notification is sent to the White House entry of that fact is then made. This method of recording is substantiated by the practice of making two entries in certain cases. See, for instance, those of Green C. Chandler (R. 76), William H. Tubbs (R. 76-77), Horace Austin (R. 77), Norman Buck (R. 77-78) and John P. Clum (R. 79).

Perhaps the appellee will contend that it is impossible to know exactly the course of practice in keeping these records. The description given by us was obtained from officials at the Executive Offices, who have been and are now in charge of keeping those records. At any rate, this course of practice

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* The use of the headings "Confirmed" and "Commissioned" began on March 4, 1905 (R. 99), and continued thereafter.

is the natural and reasonable one to expect was followed. We submit that the appellee cannot offer a more reasonable and likely explanation of how the records were kept.

We call to the attention of the Court eighteen precedents which definitely support the power of the Senate to reconsider the nomination of the appellee under circumstances similar to those at bar. They are:

(1) *Samuel M. Pollock* (R. 50).

On April 8, 1867, the Senate voted to advise and consent to his nomination as Brigadier-General by brevet. On April 10, a motion to reconsider was made and the return of the resolution previously sent to the President was requested. The President returned the resolution on April 11. The records of the Department of War show that a commission was made out to Samuel M. Pollock under date of April 11, 1867, but subsequently cancelled (R. 50). The Register of Brevet Commissions, Volume V (1861 to 1867) at page 120, records April 11, 1867, as the date of a commission to Samuel M. Pollock as Brigadier-General by brevet of the United States volunteers bestowed for faithful and meritorious service. The commission was given under the names of President Andrew Johnson and Secretary of War Edwin M. Stanton. The register also shows on the same page a notation in red ink reading "Cancelled (Rejected by the Senate)." This information is confirmed by General Order No. 84, dated "War Department Adjutant General's Office October 14, 1868", found in General Orders and General Court Martial Orders of 1868.* On this order there is also noted in red ink the words "Cancelled (Rejected by the Senate)." The Senate recommitted the nomination on April 11. On the same date the committee reported the nomination adversely. On April 13 the Senate voted to reject the nomination. The Executive Journal shows that on December 11,

* These records are kept in the Munitions Building at Washington, D. C.

1867, he was again nominated to be Brigadier-General by brevet (Executive Journal, Vol. 16, p. 77). His nomination was reported favorably from committee on January 16, 1868 and confirmed by the Senate on February 14, 1868 (*ibid*, pp. 134, 168).

(2) *Noah L. Jeffries* (R. 52).

This is a very clear case in which the President returned a notification to the Senate after a commission had been issued to the appointee. In fact, he had already entered upon the discharge of the duties of the office of Register of the Treasury. On February 12, 1868, the Senate voted to advise and consent to his appointment. On February 14, the Senate moved to reconsider and to request the return of the resolution previously sent to the President. And on February 19, the President returned the resolution, together with a letter of the Secretary of the Treasury in which the Secretary stated that "in the ordinary transaction of business the commission was issued on the 14th instant by the State Department, and was received at this Department on the 15th instant" (R. 54).

On February 24 the Senate referred this letter of the President to the Committee on the Judiciary in order that the Committee might determine whether the Senate had power to reconsider its vote of confirmation. The Committee on March 12 reported that the Senate would have the power to reconsider its vote though a commission had actually been issued to the appointee. The report of the Committee, as given in the Executive Journal, is set out at pages 53-54 of the record. The Journal contains no record of any further proceeding by the Senate on this nomination. It does appear, however, that Jeffries during the same session was nominated for a different office, that of Commissioner of Internal Revenue and was rejected by the Senate on July 25, 1868 (R. 55).

It is somewhat strange that no reference to this precedent was made by the Court below in its opinion. The appellee,

in his brief to that Court, mentions the precedent but attempts to destroy its force by stating that,

> "This view was expressed in 1868, in the height of the controversy between President Johnson and Congress and its authority is not beyond question" (Br., p. 13).

(3) *Lewis A. Scott* (R. 56).

On June 7, 1870, the Senate voted to advise and consent to his appointment as Postmaster at Lowville, New York. On the same day it ordered that the President be notified forthwith. On June 9 a motion to reconsider was entered and the return of the resolution was requested. It was returned by the President on June 13. The White House record shows that a commission was in the meantime issued to him on June 7, 1870. A later entry under date of June 18, shows "Confirmation returned—motion to reconsider withdrawn."

(4) *John W. Bean* (R. 59).

On January 11, 1872, the Senate voted to advise and consent to his appointment as First Lieutenant in the Fifteenth Infantry. On January 23, the Senate requested the return of the resolution. On February 1, the Senate adopted a motion to reconsider its resolution. The nomination was recommitted to the proper committee and no further action seems to have been taken upon it.

Yet the White House record indicates that a commission was made out to him on January 17, 1872. The President apparently considered the commission which he had thus signed of no legal force, for on June 5, 1872, he nominated Bean for promotion to First Lieutenant in the Fifteenth Infantry—the same promotion as in the nomination voted upon by the Senate on January 11, 1872.

It is true that the Journal does not record whether the President returned the resolution requested by the Senate. If the President did return the resolution, it violates the theory proposed by the Attorney General that the practice in-

dicates that the Senate's request comes too late if a commission has already been signed. If the President did not return the resolution, it violates the theory advanced by the appellee in the Court below that the Senate cannot proceed in its reconsideration of a nomination unless the notification has been returned to it.

(5) *James F. Legate* (R. 60).

The Senate voted to advise and consent to his appointment as Governor of Washington Territory on January 26, 1872. On February 1, the Senate moved to reconsider its vote and to request the return of the resolution. The President, on April 9, withdrew the nomination. In the meantime, however, a commission had been signed. This appears from the records of the White House and of the Department of State. The appellee in his supplemental brief in the Court below admits that "Here a commission was signed after notice of consent and before request to return".

In the files of the State Department there is a card reading as follows (R. 60):

> "Legate, James F. Kans.
> Governor of Washington Territory,
> Misc. 3, p. 66. January 26, 1872 conf.
> Appointment Cancelled."

The words "Appointment Cancelled" are typed in red. In a record of the State Department labeled "Miscellaneous Commissions Permanent and Temporary, Jan. 16, 1871 to March 13, 1885", Volume III, at page 66, there appears a copy of a commission issued to James F. Legate of Kansas to be Governor of Washington Territory. In this commission it is stated (R. 61):

> "* * * Given under my hand, at the City of Washington, the Twenty-sixth day of January in the year of our Lord one thousand eight hundred and Seventy-two

and the Independence of the United States of America the Ninety-sixth.

U. S. GRANT.

By the President.
Hamilton Fish
Secretary of State."

On the upper left-hand corner of this copy of the commission issued to Mr. Legate appears in black ink a notation *"Cancelled"*.

The signing of a commission on January 26, 1872, is also recorded in the White House record (R. 60). Incidentally, it may be noted that the entries in the White House record, made in inks of different color and in pencil, were most likely made at different times. In a letter recently written by the Office of the President to counsel for the appellee it is stated that,

> "the records of the executive office indicate that a commission was issued by the President on January 26, 1872" (R. 110).

From these records it appears that, despite the fact that an appointment had been made, President Grant withdrew the nomination, thereby admitting the power of the Senate to reconsider. The Court below made no mention of this case in its opinion.

(6) *George Nourse* (R. 61).

On June 5, 1872, the Senate voted to advise and consent to his appointment as Register of Linkville Land Office, Oregon. A motion to reconsider was entered and the return of the resolution requested on June 7. The Journal does not record whether or not the resolution was returned. At any rate, on June 10, the Senate reconsidered its vote and placed the nomination on its calendar. No further proceeding was taken upon this nomination during the session. The White

House record indicates that a commission was made out to him on June 8, 1872. Under the heading "Remarks" there appears in pencil a statement "Withdrawn by Senate June 10. Com. not issued". It is manifest that the remark that the commission was not issued meant that the commission was not delivered. If the commission had not been signed, there would have been no entry under the heading "Date of Commission". There are numerous cases where there is no entry under that heading.

From the record of the White House it appears that the President did not consider his commission of June 8, 1872, as legal, for during the next session he nominated him for the same office and in his letter of nomination referred to Nourse having been commissioned during the recess of the Senate.

As in the Bean case, there is no record of the return of the resolution. The same comment there made is applicable.

(7) *Alva A. Knight* (R. 64).

On January 21, 1873, the Senate voted to advise and consent to his appointment as United States Attorney for the Northern District of Florida. On January 27, a motion to reconsider was entered and the return of the resolution requested. It was returned on January 31. The White House record shows that in the meantime a commission was issued January 21, 1873. Although the motion to reconsider was subsequently withdrawn and the resolution of confirmation returned to the President, it cannot, of course, be argued that this was a confession by the Senate of its lack of power to reconsider while, on the other hand, the Executive recognized that reconsideration was not barred by the issuance of a commission.

The records of the Department of State contain a copy of a commission issued to him on January 21, 1873 (R. 64).

(8) *Belle C. Shumard* (R. 64).

On February 6, 1873, the Senate voted to advise and consent to her appointment as Deputy Postmaster at Fort Smith, Arkansas. On February 25, a motion to reconsider was entered and the return of the resolution requested. The resolution was returned on March 1. On the same day, the nomination was recommitted. No further proceeding was taken upon this nomination. The White House record shows that a commission was issued February 6, 1873. The letter of President Grant, under date of December 15, nominating Valentine Dell to the office in place of Thomas G. Scott, conclusively shows that the President, the issue of a commission to Shumard to the contrary notwithstanding, considered that no appointment had ever been made.

(9) *Peter C. Shannon* (R. 66).

On March 17, 1873, the Senate voted to advise and consent to his appointment as Chief Justice of the Supreme Court of Dakota Territory and ordered that the President be notified forthwith. On the next day a motion to reconsider was entered and the return of the resolution requested. On March 21, the President returned the resolution and on the same day the Senate, upon its reconsideration, again confirmed the nomination. It appears from the White House record that prior to the receipt of the request of the Senate to return the resolution, a commission had been issued March 17, 1873. The entries under the heading "Remarks" are indeed interesting. It appears that on March 20, the White House received the request of the Senate recalling the resolution of confirmation. The matter was then referred to the Attorney General, and despite the fact that a commission had already been signed, the resolution was returned to the Senate on March 21, presumably upon the recommendation of the Attorney General. At the same time the delivery of the signed commission was held up until the nomination was reconfirmed on March 21. It also appears from the entry under

"Date of Commission" that a new commission was signed, clearly implying that one had previously been signed.

(10) *E. Raymond Bliss* (R. 66).

On March 18, 1873, the Senate voted to advise and consent to his appointment as Deputy Postmaster at Columbus, Mississippi, and ordered that the President be notified forthwith. On March 20 a motion to reconsider was entered and the return of the resolution requested. The resolution was returned on March 22. On the same day a motion to reconsider, when put to a vote, failed. The White House record shows that in the meantime the commission had been issued March 18, 1873. The entries under "Remarks" in this case are also revealing. On March 20 the White House received the request of the Senate to return its resolution of March 18. On the next day the matter was apparently referred to the Postmaster General, for there is an entry reading "3/21. P. M. G.". And again on March 22, the resolution was returned to the Senate.

(11) *John W. Clark* (R. 68).

On March 20, 1873, the Senate voted to advise and consent to his appointment as Deputy Postmaster at Montpelier, Vermont, and ordered that the President be notified forthwith. On March 21, the confirmation was reconsidered and recalled. On March 25 the President returned the resolution. While the Journal records no subsequent proceeding on the nomination, the White House record states under "Remarks" that confirmation was received back on March 26. It appears from the White House record that a commission was issued to him March 20, 1873.

(12) *William H. Tubbs* (R. 76).

On December 20, 1878, the Senate voted to advise and consent to his appointment as Postmaster at New London, Connecticut, and on the same day ordered that the President be

notified forthwith. On January 7, 1879, a motion to reconsider was entered and the return of the resolution requested. On January 9, the President returned the resolution. The next day, upon reconsideration, the nomination was recommitted and on January 14, it was again confirmed. The White House record shows that in the meantime a commission had been signed. Under the heading "Date of Commission" there is the following entry, "Dec. 20, 1878", which was written in pencil and appears to have been erased. However, it is still barely legible.

(13) *Joseph H. Durkee* (R. 78).

On June 30, 1879, the Senate voted to advise and consent to his appointment as Marshal of the Northern District of Florida and on the same day ordered that the President be notified forthwith. On July 1, a motion to reconsider was entered and the return of the resolution requested. On the same day the President returned the resolution. After its return the Senate laid the motion to reconsider on the table. The White House record shows the issue of a commission June 30, 1879. The appellee, in his supplemental brief in the Court below, admits that in this case the President complied with the request of the Senate at a date subsequent to the issuance of the commission, as shown by the records of the White House.

(14) *Laban J. Miles* (R. 83).

On February 15, 1883, the Senate voted to advise and consent to his appointment as Indian Agent at Osage Agency, Indian Territory, and on the same day ordered that the President be notified forthwith. On February 22, a motion to reconsider was entered and the return of the resolution requested. The resolution was returned on February 26. The motion to reconsider was subsequently withdrawn on February 27. The White House record shows that a commission had in the meantime been issued on February 20, 1883.

This is confirmed by the records found in the Department of Interior (R. 83). In a vault of the Indian Office in the Department of the Interior there is a record marked "Executive appointments confirmed from 187[9] to [1891]". At page 117 of this record there is a copy of a commission issued to Miles as agent for the Indians of the Osage Agency in the Indian Territory. This copy reads in part as follows:

> "* * * during the term of FOUR YEARS from the 27th day of February, 1883, unless this commission be sooner revoked by the President of the United States for the time being * * *
>
> * * * * * * *
>
> GIVEN UNDER MY HAND at the city of Washington, the twentieth day of February in the year of our Lord one thousand eight hundred and eighty-three and of the independence of the United States of America the one hundred & seventh.
>
> CHESTER A. ARTHUR.
>
> By the President:
> H. M. Teller,
> Secretary of the Interior."

The term stated in this copy of the commission ran from February 27. This is explained by a record labelled "Roster of Inspectors, Agents, &c, Indian Office No. 2" also found in the vault mentioned above which shows that Miles had served under a previous commission which began February 27, 1879 and ran to February 26, 1883. The same record shows that under the commission given on February 20, 1883, he served up to April 20, 1883 (R. 84).

(15) *George W. Pritchard* (R. 84).

On February 19, 1883, the Senate voted to advise and consent to his appointment as United States Attorney for the Territory of New Mexico and on the same day ordered that the President be notified forthwith. On February 21, a motion to reconsider was entered and the return of the resolution requested. On February 24, the resolution was returned.

The Senate proceeded to vote upon its motion to reconsider but it failed of adoption. The White House record shows that in the meantime a commission was issued to him February 19, 1883.

(16) *Thomas H. Reeves* (R. 88).

On April 9, 1884, the Senate voted to advise and consent to his appointment as Indian Agent at Quapaw Agency, Indian Territory, and on the same day ordered that the President be notified forthwith. On April 10, a motion to reconsider was entered and the return of the resolution requested. On April 14, the President returned the resolution. On the same day the nomination was recommitted. On June 26, the President sent a message withdrawing the nomination. The White House record shows that in the meantime a commission had been issued April 11, 1884. The appellee, in his supplemental brief in the Court below, dismisses this precedent with the observation that the entry was scratched out. But it would seem rather to enhance its value.

Incidentally the entries in the White House record in this case exemplify the manner of keeping those records; that is, the entry under "Action of Senate" is made as soon as a notification is received. The entry under "Date of Commission" is made as soon as the commission is signed and statements under "Remarks" concerning the return of the resolution made when the resolution is so returned. It is clear that the entries under "Action of Senate" and "Date of Commission" were made prior to the notations under "Remarks" for they are in ink different from that used for the entries under "Remarks".

(17) *Edwin I. Kursheedt* (R. 92).

On March 27, 1889, the Senate voted to advise and consent to his appointment as Marshal for the Eastern District of Louisiana and on the same day ordered that the President be notified forthwith. On March 29, a motion to reconsider

was entered and the return of the resolution requested. Although the Journal does not record whether or not the resolution was returned, it does indicate that the nomination was referred to the Judiciary Committee on April 1 and the resolution was reconsidered and the nomination placed on the calendar on April 2. No further proceeding was taken on the nomination. The White House record shows that a commission was issued to him March 27, 1889. Moreover, from the record in this case, it appears that the President recognized that Kursheedt had never been appointed, for in his later letter nominating John B. Donally for the place he made the nomination vice Reuben B. Pleasants just as he had done when he nominated Kursheedt.

Again it appears from the record in this case that the entries under the various headings in the White House record were made *pari passu* with the events. The pencil line through March 27, 1889, was apparently drawn at the time of the entry of the notation under "Remarks" for this is likewise made in pencil.

With respect to the absence of a record in the Journal as to the return of the resolution, the comment made, *supra*, under the case of John W. Bean is applicable.

(18) *William Plimley* (R. 97).

During the administration of President Roosevelt this most interesting and significant case arose. On March 10, 1903, the Senate voted to advise and consent to the appointment of William Plimley as Assistant Treasurer of the United States at New York City. But two days later the Senate moved to reconsider its vote and directed its secretary to request the President to return to it the resolution which had been forwarded to him. On March 13, President Roosevelt returned the resolution to the Senate, and on March 18 withdrew the nomination entirely. Yet, prior to the time the President returned the resolution to the Senate, it conclusively and indisputably appears from the records of the White House and of the Treasury Department that a

commission had in fact been signed and sealed, that is, an appointment had been made. What happened between March 10 when the Senate voted to advise and consent to the appointment of William Plimley and March 13 when the President returned the resolution to the Senate, is seen from a memorandum apparently prepared at the time. This memorandum found in the records of the Treasury Department reads as follows (R. 97):

> "Letter from Mr. Loeb, Secretary to the President, about March 9th, stating that the President desired nomination prepared and sent over for William Plimley of New York, to be Assistant Treasurer at New York.
>
> Nomination prepared and sent to the President March 10th.
>
> Notice of nomination and confirmation in Congressional Record of March 10th.
>
> Official notice of confirmation from the Secretary of the Senate, through the White House, dated March 10th, received at the Appointment Division March 11th.
>
> Commission prepared March 12th and sent to the White House; was signed by the President, attested by the Secretary of the Treasury, received the seal of the Treasury Department, and a letter notifying Mr. Plimley of his appointment and enclosing official bond for execution by him was prepared and mailed, addressed, 'William Plimley, 151 West 8th Street, New York City'; all of which occurred on the same date.
>
> Shortly after four o'clock on March 12th, the Chief of the Division of Appointments was called up on the telephone by the White House and asked what papers were on file in the Plimley case, to which the Chief replied, all papers which accompanied the President's direction that nomination be prepared and no others. The White House then asked what was the status of the case; answer: Commission signed by the President had received the seal of the Treasury Department; that a bond had been prepared, and letter notifying Mr. Plimley of his appointment had been placed in the mail. White House asked to hold up everything until Mr. Latta of the White House staff could come over. Mr. Latta immediately came to the Division of Appointments bringing with him the resolution of the Senate recalling

its notice of confirmation, and with the direction of the President to get commission and all papers in the case and take them with him to the White House.

The Chief of Appointment Division conferred with the Secretary and, with his knowledge and consent, gave to Mr. Latta all papers on file here, but did not deliver the commission, the same being inaccessible at that time.

The Chief of Appointment Division, on his own responsibility, but with the knowledge of the Secretary, intercepted bond and letter mailed to Mr. Plimley in the Washington City Post Office and had it returned to the Department.

The next day, at the request of the President, Mr. Plimley's commission, together with a brief containing citations from the decisions of the Supreme Court of the United States and the Attorney General, was taken to the White House by the Secretary, where they still remain.

On March 18th directions were received from the White House by telephone to prepare a request for the withdrawal of the nomination of Mr. Plimley from the Senate. Request was promptly prepared and taken to the White House by the Chief of Division of Appointments, who delivered the same to Mr. Loeb, the President's Secretary. Later in the day directions were received by wire from the White House to prepare a nomination of Hamilton Fish of New York as Assistant Treasurer at New York in place of Jordan, deceased. Nomination prepared and sent to the White House by messenger."

The files of the Treasury Department, moreover, contain unquestionable evidence that a commission had been signed by the President prior to his return of the resolution. This evidence confirms the statement in the memorandum just quoted that a commission was prepared, signed by the President, attested by the Secretary of the Treasury and impressed with the seal of the Treasury Department prior to the return of the resolution of March 13 by the President (R. 98). In the files there is the original letter of March 12, 1903, and the original envelope addressed to "Mr. William Plimley, 151 West 80th St., N. Y. City". The envelope is post-marked

"March 12 5:30 P. M., 1903" and has on it a notation in red ink reading "Return to writer on request by phone, 3.12.03 #74". In the envelope there is an official bond in the amount of $400,000 and, also, a slip of paper with a notation "Senate notice of confirmation to Plimley sent to Pres. March 13, 03 at his request". The letter of March 12 addressed to William Plimley shows beyond doubt that Mr. Plimley had already been appointed by the President to the office of Assistant Treasurer of the United States at New York City, for the letter reads as follows (R. 98):

"Notice of Appointment under Confirmation
and Transmitting Bond.

Treasury Department,
Office of the Secretary,
Washington, D. C.
March 12, 1903.

Mr. William Plimley,
151 West 80th Street,
New York City.

Sir:

By direction of the Secretary, I have to inform you that the President of the United States has, by and with the advice and consent of the Senate, appointed you to the office of Assistant Treasurer of the United States at New York, N. Y., by a commission dated March 12, 1903.

You will therefore enter into bond with the United States in the penal sum of four hundred thousand dollars ($400,000.) in accordance with the enclosed form and the rules regulating the execution thereof, and transmit the same to this office for examination, approval and file.

Your commission will be forwarded when your official bond shall have been received and approved.

Respectfully,

(Signed) CHAS. LYMAN,
Chief, Division of Appointments."

(Incl.)

The signing of a commission on March 12, 1903, as indicated by the records of the Treasury Department, is con-

firmed by the White House record (R. 97). Once more attention is called to the fact that the White House at present interprets the entries under the heading "Date of Commission" or "Commissioned" as the date on which the commission was actually signed. See letter from the Office of the President to counsel for the appellee (R. 110).

It is interesting to note that the power of the Senate to reconsider the nomination of Plimley was apparently referred to the office of the Attorney General. A brief was prepared on the point (R. 98). With the cooperation of the office of the Attorney General we attempted to trace this brief, but were unsuccessful. But at any rate, in view of the subsequent action by the President, it is not too bold to presume that the opinion of the Attorney General was in favor of the power of the Senate.

The Court below in its opinion made no mention of this case, though it was presented and emphasized by the appellant. The appellee, while admitting that the records of the White House and of the Treasury Department indicate that a commission to Plimley had been signed by the President before the receipt of the Senate's request for a return, commented at page 22 of his brief as follows:

> "The Plimley case, therefore, is not one in which the President stood upon his rights and maintained the title of his appointee, but one in which the President and the Senate *joined in ignoring* the technical rights of the office holder." (Italics added.)

Now turning to the cases occurring since the fundamental changes in the rules on April 6, 1867, upon which the appellee rests, we find there are only three: *B. A. Boseman*, *J. C. S. Colby* and *Morris Marks*. The Court cites these three cases in its opinion. We shall discuss each of them.

(1) *B. A. Boseman* (R. 67).

On March 18, 1873, the Senate voted to advise and consent to his appointment as Deputy Postmaster at Charleston

Court House, South Carolina. On the same day it was ordered that the rule be suspended and that the confirmation be transmitted forthwith to the President. Two days of actual executive session, March 19 and 20, went by without further action. On March 21, the President sent a letter to the Senate withdrawing the nomination, although it appears from the White House record that in the meantime a commission had been issued March 18. The Senate, wishing the appointment to stand, denied by formal resolution the power of the President to withdraw.

In his brief in the Court below, the appellee placed considerable emphasis upon this case. He argued that the decision of the Senate that the nomination could not be withdrawn by the President on March 21, because it had been confirmed and finally disposed of and because the same had gone out of its possession implied a forceful recognition by the Senate of the limitation upon its power to reconsider. But the appellee below apparently overlooked the fact that not only had the rule been formally suspended, but also that there had been, prior to the receipt of the letter withdrawing the nomination, two executive sessions which cut off the power of the Senate to reconsider. The stage of finality had been reached. It would seem that if the President wished to retrace his steps the proper method was to revoke the appointment he had duly made, and remove the appointee, rather than attempt an alteration of the parliamentary status.

The Court below in its opinion rested heavily upon this case. It found in the case evidence that the Senate all the while consistently adhered to the principle stated by Jefferson which we have discussed (R. 22). We submit, however, that the Boseman case, when properly understood, offers no support to the construction proposed by the appellee and adopted by the Court below.

(2) *J. C. S. Colby* (R. 69).

On December 17, 1874, the Senate voted to advise and consent to his appointment as Consul at Chin Kiang and ordered

that the President be notified forthwith. On December 21, a motion to reconsider was entered and the return of the resolution was requested. On January 5, 1875 the President wrote the Senate that a commission for the appointee had been signed on December 17, and that prior to the receipt of the request the commission had been forwarded by mail to the appointee. No further proceeding appears to have been taken on this nomination.

It was contended by the appellee in the Court below that in this case there was again a recognition by the Senate of its lack of power to reconsider a nomination if the resolution were not returned and a commission had in the meantime been issued. The Court below in its opinion similarly cited the case in support of its decision and stated with respect to it that "the Senate accepted this reply of President Grant as conclusive" (R. 23). We submit, however, that this case cannot be so applied. The rigid legal question of the power of the Senate was never faced. It would seem that the President, on one hand, did not consider it within his power to refuse to return the resolution and that the Senate, after the receipt of the information furnished by the President, on the other hand, was not disposed to insist upon it.

We wish, however, in connection with this case to call attention to the fact that the White House record shows under the heading "Date of Commission", "December 17, 1874". The President's letter confirms the interpretation of that entry as meaning that the commission was signed by him on the 17th day of December (R. 70).

(3) *Morris Marks* (R. 74).

On June 6, 1878, the Senate voted to advise and consent to his appointment as Collector of Internal Revenue of the District of Louisiana and on the same day ordered that the President be notified forthwith. On June 11, a motion to reconsider was entered and the return of the resolution requested. The President, in his reply of June 14, informed the Senate that upon receipt of the notice of confirmation

the commission of Marks was signed and delivered to him on June 8. Though the Journal records the fact that this message was read, it contains no subsequent reference to the case.

As in the case of J. C. S. Colby, the appellee and the Court below considered this case as of real weight. We submit, however, that it is impossible now to read into the record reasons why the Senate did not proceed further in the matter.

Again in this case, we desire to point out that the record entry, June 8, 1878, under the heading "Date of Commission" is again confirmed by the President's letter as the date on which the commission was signed by him.

POINT II.

In adopting Rules XXXVIII and XXXIX the Senate did not exceed the power vested in it by Article I, Section 5, of the Constitution. The Rules are binding on both the Senate and the Executive.

We have already seen that Rules XXXVIII and XXXIX upon their face, in plain and unambiguous terms, provide that the Senate shall have unrestricted power to reconsider within the next two days of actual executive session any confirmation or rejection previously made by it. We have also seen that the rules contain no tangible or explicit basis for asserting that the President may under certain circumstances truncate this power either by issuing a commission or by refusing to return the notification. But it may be contended by the appellee that to apply the rules as their terms demand would render them obnoxious to the Constitution by giving to the Senate the power of removal from an office once assumed. We submit, however, that the Senate in providing in its rules that it should unqualifiedly retain

the power to reconsider until the expiration of two days of executive session did not exceed the power vested in it by the Constitution to "determine the rules of its proceedings" (Article I, Section 5). It is unnecessary for this Court to adopt a forced and unnatural construction of the rules in order to preserve their validity.

There can be no doubt that the power vested in the Senate to determine the rules of its proceedings, like all other powers, has its limitations. Not every exercise will be sanctioned. But what are the tests adopted by this Court to determine when a rule is not binding upon the coordinate branches of the Government? The only decision relating to the standing rules of a House of Congress is *United States* v. *Ballin,* 144 U. S. 1. In this case the validity of a certain act was challenged on the ground that a proper quorum was not present in the House of Representatives at the time of its passage. The House had a rule expressly providing what should constitute a quorum. This Court held that since the provisions of the rule were in fact satisfied and the rule was valid and binding, the act could not be challenged. Mr. Justice Brewer in his opinion stated:

> "The action taken was in direct compliance with this rule. The question, therefore, is as to the validity of this rule, and not what methods the Speaker may of his own motion resort to for determining the presence of a quorum, nor what matters the Speaker or clerk may of their own volition place upon the journal. Neither do the advantages or disadvantages, the wisdom or folly, of such a rule present any matters for judicial consideration. With the Courts the question is only one of power. The Constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate or even more just. It is no

> objection to the validity of the rule that a different one has been prescribed and in force for a length of time. The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal" (pp. 4-5).

From this opinion it would appear that the tests to be applied by this Court in the case before it are these:

1. Do Rules XXXVIII and XXXIX "ignore constitutional restraints or violate fundamental rights?"

2. Is there "a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained?"

If the former test can be answered negatively and the latter affirmatively, then, as stated by Mr. Justice Brewer neither "the advantages or disadvantages, the wisdom or folly, of such a rule present any matters for judicial consideration. With the courts the question is only one of power."

These tests are, of course, not novel. In essence they are identical with the tests applied by this Court for the determination of the constitutionality of the exercise of any power vested in Congress or in either House. As the Chief Justice stated in the oft-quoted passage from *McCulloch* v. *State of Maryland*, 4 Wheat. 316, 17 U. S. 315:

> "The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception (pp. 409-410).
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> We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be

transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional" (p. 421).

Adjudications by State courts which deal specifically with the reconsideration of action taken by a legislative body, have consistently applied the tests announced in *United States* v. *Ballin*. See, for instance,

Smith v. *Jennings*, 67 S. C. 324; 45 S. E. 821 (1903);
State v. *Savings Bank of New London*, 79 Conn. 141, 152; 64 Atl. 5, 9 (1906);
Crawford v. *Gilchrist*, 64 Fla. 41; 59 So. 963 (1912);
People v. *Common Council of Rochester*, 5 Lans. (N. Y.) 11, 14-15 (1871), and
State ex rel. West v. *Butler*, 70 Fla. 103, 120; 69 So. 771, 776 (1915).

In *State* v. *Savings Bank of New London, supra*, at page 152, the Supreme Court of Connecticut stated:

"There being no claim of a violation of any constitutional restriction, we cannot pass upon the regularity of these proceedings. The power of the House, directly after the passage of a bill, and on the day of its passage, to suspend the operation of that vote, to reconsider the vote, and to take different action, cannot be questioned. The Constitution declares that each House shall determine the rules of its own proceedings and shall have all powers necessary for a branch of the legislature of a free and independent State. Rules of proceedings are the servants of the House and subject to its authority. This authority may be abused, but when the House has acted

in a matter clearly within its power, it would be an unwarranted invasion of the independence of the legislative department for the court to set aside such action as void, because it may think that the House has misconstrued or departed from its own rules of procedure."

In *Crawford* v. *Gilchrist, supra,* pages 54-55, the Court adopts the reasoning of *United States* v. *Ballin:*

> "The Constitution expressly provides that 'each House shall * * * determine the rules of its proceedings'; * * * The provision that each House '*shall* determine the rules of its proceedings' does not restrict the power given to the mere formulation of standing rules, or to the proceedings of the body in ordinary legislative matters; but, *in the absence of constitutional restraints,* and when exercised by a majority of a constitutional quorum, such authority extends to the determination of the propriety and effect of any action as it is taken by the body as it proceeds in the exercise of any power, in the transaction of any business, or in the performance of any duty conferred upon it by the constitution."

IN RULES XXXVIII AND XXXIX THERE IS A "REASONABLE RELATION BETWEEN THE MODE OR METHOD OF PROCEEDING ESTABLISHED BY THE RULE AND THE RESULT WHICH IS SOUGHT TO BE ATTAINED."

In applying the test expounded by Mr. Justice Brewer, it is pertinent to consider how the provisions of Rules XXXVIII and XXXIX fit into the entire process of nomination, confirmation and appointment of an officer. From an examination of the rules it definitely appears that the Senate sought to make them reasonable and practical in their application. To begin with, the Senate took care that Rule XXXVIII should not foster mere obstructive tactics. A motion for reconsideration can be made only by a Senator who voted with the majority. Such a provision was incorporated in the first rules of the Senate adopted on February 25, 1790 (R. 25), and has since formed a part of any and every rule relating to

reconsideration of any action previously taken by the Senate. In fact, this provision forms part of the normal system of American parliamentary procedure.* The Senate sought also to limit to a reasonable period the time within which such a motion would be in order. For it provided that the motion can be made only "on the same day on which the vote was taken or on either of the next two days of actual executive session of the Senate". The rules of March 26, 1806, permitted reconsideration "within the three next days of actual session of the Senate thereafter" (R. 25-26). On January 3, 1820, however, the period of three days was cut down to two (R. 26). The same period was retained in the rules of April 6, 1867 (R. 27), and in the rules adopted on March 25, 1868 (R. 27). When the Senate on January 17, 1877, adopted Rule 74 dealing specifically with the reconsideration of a nomination in closed executive session, it was provided that the motion could be made only "on the same day on which the vote was taken, or on either of the next two days of *executive* session of the Senate" (R. 29). At this point it may also be noted that the present Rule XIII relating to the reconsideration of all other action by the Senate adopts the period of two days of actual session thereafter.

It may perhaps be contended by the appellee that the period of two days of actual executive session after the vote of the Senate is taken may turn out in certain instances to be unduly extended in point of actual calendar time. The Court below envisaged this possibility (R. 24-25). But the same accusation, of course, could be levelled in a lesser degree against the provision that the motion can be made at any time within the next two days of ordinary session. But in answer to this, suffice it to state that the practice of the Senate since the adoption of this provision on January 17, 1877, has been to

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*Jefferson, Manual of Parliamentary Procedure, Section XLIII, and Henry M. Robert, Manual of Rules of Order for Deliberative Assemblies, Ed. of 1890, p. 66. See also *Witherspoon* v. *State*, 138 Miss. 810, 103 So. 124 (1925), and *People* v. *City of Rochester*, 5 Lansing (N. Y.) 11 (1871).

go into executive session very often, although it be only for a short time. Under the rules it is sufficient that the Senate go into executive session for a moment. A comparison of executive and legislative sessions in point of frequency during the last session of Congress is presented herewith as Appendix A, showing that no undue delays are possible because of the infrequency of executive sessions. Yet even if it were possible to point to a few unusual instances in which the Senate did not go into executive session for many days or conjure up even more exaggerated situations, the reasonableness of the means adopted by the Senate is nevertheless not impugned. The reasonableness of the reconsideration rule is to be tested by the usual and general practice of the Senate. Its possible inconvenience or hardship in a supposititious case does not brand it as invalid.

Ex parte Kearney, 7 Wheat. 38, 45;
Evans v. *Jordan*, 9 Cranch 199, 203;
Magoun v. *Illinois Trust & Sav. Bank*, 170 U. S. 283, 299-300;
United States v. *Delaware & Hudson Co.*, 213 U. S. 366, 405;
Boudinot v. *United States* (Cherokee Tobacco), 11 Wall. 616, 620.

And finally an attack on the rule on the ground of its possible dilatory character is repelled by recalling that the Senate has the unquestioned power to delay action on a nomination during the entire period of its session. It may also be added that this period of reconsideration is sanctioned by a legislative practice extending from January 17, 1877, or for more than half a century.

The Senate likewise undertook to make the reconsideration rule reasonable and practical by providing in paragraph 5 of Rule XXXVIII that any motion to reconsider a vote upon a nomination which shall be pending at the time the Senate shall adjourn or take a recess for more than thirty days shall fall. This provision also appeared in Rule 37,

adopted on March 25, 1868 (R. 28), and formed part of Rule 76 of the rules of January 17, 1877 (R. 30).

Further proof of the desire of the Senate to have its rules bear a reasonable relation to the result sought to be attained and to prevent hurtful delays is to be found in the provision of paragraph 3 of Rule XXXVIII whereby any action of the Senate on a nomination can forthwith be made final by making a motion to reconsider and tabling the same. This provision first appeared in Rule 74 adopted on January 17, 1877, and has since been part of the reconsideration rule (R. 29).

Turning specifically to the effect of the rules on the President, it will be seen that in this respect also the rules are reasonable and appropriate to the end sought by the Senate in their adoption. The Senate notifies the President of every vote confirming or rejecting a nomination by forwarding to him an authenticated transcript of the resolution indicating its action upon the particular nomination. See paragraph 4 of Rule XXXVIII and Rule XXXIX. If the resolution is sent to the President after the expiration of the period within which the Senate can reconsider its action, or in case a motion to reconsider has been made, after it has been disposed of, no difficulties in the practical administration of the rule arise. But even if the resolution is forwarded to the President prior to the expiration of the period in which the Senate can reconsider, as in the case before this Court, the President can not be misled. Every resolution sent to the President bears the date of the vote of the Senate. If the vote be one advising and consenting to an appointment, the President thereupon can easily inform himself when the period within which the Senate can reconsider will transpire. The President is further protected by the provision in paragraph 3 of Rule XXXVIII which requires that a motion to reconsider be accompanied by a motion requesting the President to return the resolution previously transmitted to him. When such a motion is made the Secretary of the Senate immediately forwards a copy of it to the President. Hence it is

impossible for the Senate to reconsider a vote on a nomination without notifying the President of its desire to do so.

The Attorney General in his opinion of January 10, 1931, stated that "The rules provide in such case for no second notification, and if the first one be not effective so that the President may rely on it, he never will receive a notification of final consent to the appointment. The President would never be able to rely on any notification and would be obliged to inform himself as best he might as to whether the Senate had finally consented to the appointment."

Obviously the President is not left in so hopeless a position as the Attorney General portrays. We do not dispute that if a notification is sent to the President prior to the expiration of the period within which the Senate can reconsider a vote, the President, as stated by the Attorney General, "would be obliged to inform himself as best he might as to whether the Senate had finally consented to the appointment." We merely add that the established legislative and executive machinery places such information at all times at the President's ready command.

Under the practice immediately following March 25, 1868, the date of the adoption of the rule directing the Secretary of the Senate not to send a resolution to the President until the expiration of the time limited for making a motion to reconsider or while such a motion is pending unless otherwise ordered, the Senate rarely ordered a report of its vote to be forwarded to the President prior to the expiration of the reconsideration period. Gradually, however, it became more and more customary to order the resolution to be sent before the expiration of the reconsideration period—so much so that recently the practice has been to forward the resolution to the President forthwith in the case of nearly every nomination. From the point of view of the President, therefore, the worst that can be alleged against the operation of the present reconsideration rules is this: whereas the practice of the Senate immediately subsequent to the adoption

of Rule 43 on March 25, 1868, was such as only rarely to suggest to the President the expediency of informing himself whether the reconsideration period had in effect transpired, now, on the other hand, such information is more frequently needed.

Rules XXXVIII and XXXIX Do Not "Ignore Constitutional Restraints or Violate Fundamental Rights."

We return to the first test propounded in *United States* v. *Ballin*. Rule XXXVIII has been interpreted by the Senate as permitting, without any limitation or qualification, a reconsideration of a vote on a nomination within the next two days of actual executive session. In Point I of this brief we have argued that this interpretation of the Senate is the only one possible under the explicit and definite provisions of Rules XXXVIII and XXXIX. We submit that as so interpreted the rule does not even approach the zone within which it might be alleged that constitutional restraints are ignored or fundamental rights violated.

In a letter sent by the President to the Senate on January 10, 1931, the President stated that he could "not admit the power in the Senate to encroach upon the executive functions by removal of a duly appointed executive officer under the guise of reconsideration of his nomination" (R. 6). In the light of the history of the Senate Rules and of the long continued practice between the Senate and the President with respect to the return of resolutions, the President was apparently misinformed as to the nature of the action contemplated by the Senate in reconsidering its vote advising and consenting to the appointment of the appellee. If we are correct in our interpretation of the Standing Rules of the Senate, the action of the Senate did not become final and irrevocable until the possibility of a reconsideration of its vote had passed. Until then there had been no binding confirmation. Accordingly, the statement of the President that the Senate was removing a "duly appointed executive officer" begs the

entire question. By no one is it contended that if the Senate had finally voted to advise and consent to the appointment of the appellee, it could then remove him. Such power the Senate clearly does not possess. *Myers* v. *United States*, 272 U. S. 52.

Only to the uninformed could it appear that the Senate was attempting to remove the appellee from office. The argument to this effect results from the fact that at the time of reconsideration the appellee, as a putative commissioner, had entered, in so far as it was possible for him to do, upon his office and was in fact discharging the duties incumbent upon a member and Chairman of the Federal Power Commission. But obviously it is but superficial reasoning to treat this aspect of the matter as conclusive. In the first place, if the Senate had not finally and ultimately confirmed his appointment he was not yet a "duly appointed executive officer". Nor can this court inquire whether or not the Senate proceeded to the reconsideration of its vote of December 20, 1930, because of any action which the appellee had taken in the attempted discharge of his duties as member and Chairman of the Federal Power Commission. The reasons of the Senate are for the Senate alone. Moreover, it would be quite impossible to state what motivated each and every senator in his vote in support of the motion to reconsider and in favor of the subsequent rejection of the nomination. One may be reasonably certain that all the senators were not motivated alike. But even assuming that all the senators were motivated solely by their disapproval of action taken by the appellee as a member and Chairman of the Federal Power Commission the situation, from the point of view of the legal *power* of the Senate to exercise its reserved right to reconsider, is the same as if the appellee prior to being commissioned and entering upon the discharge of the duties of his office had publicly stated what he intended to do once he did assume the duties of his office.

The contention of the appellee in the Court below "that the Executive, after appointment, could not restore the control

to the Senate without violating and infringing the rights of the appointee" (R. 17), like the statement in the letter of the President of January 10, 1931, begs the entire question. If the appointment was made without the advice and consent of the Senate the appointee has no fixed legal rights.

No argument appears that will support the contention that the Senate in adopting the provisions of Rules XXXVIII and XXXIX exceeded the power vested in it by Article I, Section 5 of the Constitution to "determine the rules of its proceedings."

And manifestly the provisions of these valid rules are binding both on the members of the Senate and on the Executive in his dealings with the Senate.

> *Crawford* v. *Gilchrist*, 64 Fla. 41, 58; 59 So. 963, 969;
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> *People ex rel. Birch* v. *Mills*, 32 Hun (N. Y.) 459, 460 (1884);
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> *State* v. *New London Savings Bank*, 79 Conn. 141; 64 Atl. 5 (1906);
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> *Witherspoon* v. *State ex rel. West*, 138 Miss. 310; 103 So. 134 (1925).

The appellee, in fact, conceded this in his brief in the Court below. At page 8 he states:

> "The Senate, under the constitution, has the power to make rules for the regulation of its business and these rules, if consonant with the constitution, had the force of law."

POINT III.

The signing and delivery of a commission and the taking of an oath by the appellee cannot fortify his position or shield him from ouster.

Before the next succeeding day of executive session had arrived or the time for reconsideration had expired, the appellee had already received a commission, had taken the required oath of office and had entered upon the discharge of the duties of the office of member and Chairman of the Federal Power Commission. These steps, however, vested no rights in him.

As we have seen, the Senate by its rules retained without qualification or limitation the power to reconsider its vote at any time within the next two days of actual executive session. Until the expiration of this period, the power of the Senate to advise and consent to the appointment of the appellee or to refuse to do so was in no sense exhausted. Until that time there was and could be no irrevocable confirmation as required by the Constitution. And once the Senate adopted the motion to reconsider the appointment of the appellee, the vote previously taken by the Senate was automatically nullified and invalidated. Under such circumstances, the lack of a confirmation by the Senate as required by the Constitution could not be cured by any action on the part of the President. These conclusions are well supported by numerous adjudications. Added significance is given to the principles expounded in some of the cases by the lack of aid to be derived from definite rules granting and governing the right to reconsider.

People ex rel. MacMahon v. *Davis*, 284 Ill. 439, 120 N. E. 326; 2 A. L. R. 1650 (1918);

Witherspoon v. *State ex rel. West*, 138 Miss. 310; 103 So. 134 (1925);

Wood v. *Cutter*, 138 Mass. 149 (1884);

Crawford v. *Gilchrist*, 64 Fla. 41, 59 So. 963; 32 Ann. Cas. 916 (1912);
Dust v. *Oakman*, 126 Mich. 717; 86 N. W. 151 (1901).

In his opinion of January 10, 1931, the Attorney General admitted that the legal status of the appellee is not altered by the fact that he has received a commission, taken an oath and entered upon the discharge of his duties unless there has actually been a confirmation by the Senate. The Attorney General there stated:

> "Upon the foregoing facts, the ultimate question in this case is whether the appointments were made with the consent of the Senate. If the appointments were made without that consent, they were ineffective and invalid, but if made with the Senate's consent, the function of the Senate in respect of the appointments is ended."

While the taking of the required oath may be a necessary prerequisite to the appointee's entry on his official duties, it is clear that he cannot by his own act in so doing add anything to the validity of his appointment or cure any antecedent defects in his title to the office. In fact, this principle is implied in the statutory provision requiring an oath of an officer. The oath acquires legal sanction only if the officer has already been duly appointed. See U. S. C. Title 5, Section 16.

In law, the situation before the Court is no different from a case of a resolution confirming a certain nominee sent by mistake by the Secretary of the Senate to the President and followed by the issuance of a commission. In such a case, it would hardly be contended that the appointee had become legally invested with title to the office. The doctrine of apparent authority found in the law of agency would have no application. This supposititious case again would be no different from one in which the President issued a commission to a person whose nomination was by error not even submitted to the Senate for its vote of advice and consent.

The sole question, therefore, is whether the Senate did or did not confirm. If the Senate did not in fact finally and completely confirm the nomination, the constitutional requisite cannot be otherwise implied or supplied.

As has been pointed out, courts have repeatedly declared that so long as a legislative body retains its right to reconsider, its actions cannot be held to be final and complete.

In *People ex rel. MacMahon* v. *Davis, supra,* the relators appealed to the Illinois Supreme Court from a judgment of the lower court dismissing a petition for leave to file an information in the nature of a *quo warranto* to oust the defendants from the offices of the Board of Education and to install the relators in their place. The Supreme Court reversed the decision on the following facts. On June 18, 1917, the Mayor of the City of Chicago submitted to the Council the names of the defendants for appointment as members of the Board of Education. By statute it was provided that the members of the Board should be appointed by the Mayor with the approval of the City Council. At that meeting, a motion to concur in the appointments prevailed. Thereupon, one of the aldermen voting in the affirmative moved to reconsider the vote. The City Council had a definitive rule which provided:

> "A vote or question may be reconsidered at any time during the same meeting or at the first regular meeting held thereafter. A motion for reconsideration having been once made and decided in the negative shall not be renewed, nor shall a vote to reconsider be reconsidered" (p. 444).

A motion was subsequently made to lay the motion to reconsider on the table, which motion prevailed. Thereupon, the Council adjourned to June 22, the time fixed for the next regular meeting. At this subsequent meeting, a motion to take the motion to reconsider from the table prevailed. The question was then put on the motion to concur in the appointments of the defendants and this motion was lost. It should be noted that the defendants, from the day next succeeding the vote of the Council to concur in their appointments, as-

sumed and pretended to perform the duties of the office of members of the Board. The Supreme Court held that the relators were entitled to a writ of *quo warranto* to oust the defendants despite the fact that the defendants had assumed the discharge of the duties and powers of the office prior to the time the City Council voted upon reconsideration not to concur in their appointments.

In an opinion carefully reviewing the authorities the Court stated, at page 446:

> "It is insisted that the council has no power to reconsider an election of officers by it; that the confirmation of an appointment is virtually an election to office; that the same rule applies to confirmations as to elections; and that the weight of judicial authority denies to deliberative assemblies the power to reconsider the election of an officer which it was authorized to make. This is not, however, the case of an election—a choice between two or more candidates. The council does not in any sense choose the appointee. The question before it is the approval of an executive act of the mayor. Its action is discretionary and deliberative. *No good reason is apparent why the council may not establish rules in such cases for the government of its own procedure in arriving at its final judgment,* as well as in other cases. Orderly procedure requires some rules for the proper despatch of business and deliberation in its conduct. The confirmation of executive appointments should be deliberately considered, and the rules applicable to ordinary questions to secure such deliberation may well be applied.
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> The action of the appellees in assuming the offices the next day, while the question of the confirmation of their appointment was pending in the council, and in afterward exercising the powers and duties of the offices, did not have the effect of giving them any title to the offices. *The effect of the motion to reconsider the vote to concur in the appointments was to suspend all actions based upon that vote until the reconsideration was acted upon.* The vote to reconsider at the meeting of June 22 was an annulment of the previous vote, and the subsequent vote

was effectual to disapprove the appointments." (Italics added.)

In *Witherspoon* v. *State ex rel. West, supra,* an information in the nature of a *quo warranto* was brought to try the right of the appellant to the office of commissioner of a levee district. The name of the appellant was submitted by the Governor of Mississippi to the Senate which adopted in a secret executive session held on January 18, 1924, a resolution confirming the appointment of the appellant. At this meeting it was ordered that the ban of secrecy be removed from the executive session but no order was made directing that the Governor be notified of the vote on the appellant's confirmation. On January 23, the appellant was properly commissioned by the Governor. On January 30, the vote by which the resolution confirming the appellant's appointment was adopted was reconsidered by the Senate pursuant to its standing rules. At that meeting the successor Governor withdrew the name of the appellant and sent to the Senate the name of the relator which was properly confirmed by the Senate. On April 5, the relator was commissioned by the successor Governor. The Supreme Court of Mississippi held that the relator was entitled to the office despite the fact that the appellant prior to the reconsideration of his appointment by the Senate had received a commission to the office. In its opinion, the Court stated, at page 322:

> "The contentions of counsel for the appellant in this connection in substance are: (1) An appointment to office is complete when the last act required of the person or body vested with the appointing power has been performed. (2) When the Senate has confirmed an appointment to office, it has performed the last act required of it relative thereto, and it is without power to thereafter revoke its confirmation. Both of these contentions are undoubtedly correct, and to cite authority therefor would be supererogatory.
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> The question then presented is, Did the Senate confirm the appellant's appointment? Or, to express it differently, *Was the affirmative vote on the resolution confirm-*

ing the appellant's appointment final? For, unless that vote was final, the confirmation remained in fieri, and subject to the control of the Senate.

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Among the rules of the Senate adopted by it pursuant to the authority conferred on it by this section of the Constitution and in force January 30, 1924, are the following:

'Rule 40. When a question has been once made and carried in the affirmative or negative, it shall be in order for a Senator voting with the prevailing side to move a reconsideration thereof; but, where the yeas and nays have not been had, this restriction shall not prevail; any Senator may make the motion to reconsider.

'Rule 41. No motion to reconsider a vote shall be entertained unless it be made on the same day on which the vote was taken or on the next day on which a quorum is present.

'Rule 43. Nominations approved or rejected by the Senate shall not be returned by the Secretary of the Senate to the Governor or other officer until the expiration of the next executive session, unless it be the last day of the session; or while a motion to reconsider is pending, unless otherwise ordered by the Senate.'

* * * * * * *

Of course, as hereinbefore stated, when the Senate confirms an appointment made by the Governor, it is without power thereafter to revoke the confirmation, but under the rules of the Senate which the Constitution authorized it to adopt no vote on the confirmation of an appointment to office is final, and *consequently there is no such confirmation until a motion to reconsider an affirmative vote thereon has been disposed of adversely or the time for the making thereof has expired without such a motion being made.*" (Italics added.)

The Court in its opinion compared rules of the Senate of the State of Mississippi with paragraphs 3 and 4 of Rule XXXVIII of the Standing Rules of the Senate. The provisions of the rules of the Senate of the State of Mississippi

and of the United States Senate are very similar in substance.

In *Wood* v. *Cutter, supra,* Mr. Justice Holmes, then on the Supreme Judicial Court of Massachusetts, upheld the right of a school committee to reconsider an appointment of a superintendent of schools. In his opinion he stated:

> "It begs the question to say that the board had once definitely voted in pursuance of the instructions of the town meeting, and therefore was functus officio and could not reconsider its vote. *The vote was not definitive if it contained the usual implied condition that it was not reconsidered in accordance with ordinary parliamentary practice,* and it must be taken to have been passed subject to the usual incidents of votes, unless some ground is shown for treating it as an exception to common rules" (Italics added). (p. 150.)

In *Crawford* v. *Gilchrist, supra,* the Governor of the State of Florida, as Governor and as an individual, sought an injunction against the Secretary of State for an order enjoining the Secretary from continuing the publication of a presumed amendment to the State Constitution, and enjoining him from certifying it. The defendant appealed to the Supreme Court for a supersedeas against a temporary injunction granted by the lower court. The appeal was denied.

It appears that the House Joint Resolution proposing the amendment was duly passed by the House and certified to the Senate. On May 24, 1911, the Senate also passed the resolution by the requisite three-fifths vote and spread it upon its journal. It is significant to note, moreover, that the passage of the resolution was certified to the House, that is, the resolution was returned to the House. But on the succeeding day, a member of the Senate, pursuant to its rules adopted under constitutional authority, made a motion to reconsider the vote by which the Senate had passed the House Joint Resolution. This motion to reconsider went over under the rules. On motion agreed to by the Senate, the resolution was recalled from the House and was duly returned by the

House to the Senate. A subsequent motion to table the motion to reconsider was defeated. Later it was agreed to defer the motion to reconsider, subject to call. It does not appear from the Senate Journal that any further action respecting the resolution was taken by the Senate.

The Court in its opinion pointed out that the Constitution mandatorily requires amendments to be

> " 'agreed to by three-fifths of all the members elected to each house' of the Legislature. These requirements clearly contemplate that such amendments shall be agreed to by the *deliberate, final affirmative vote* of the requisite number of the members of each house of the Legislature duly taken at a regular session" (Italics added). (p. 54.)

The Court, in its reasoning, continued, at page 55, as follows:

> "If by an affirmative vote of three-fifths of all the members elected to the Senate a proposed amendment of the constitution is passed, and such vote is allowed by the Senate under 'the rules of its proceedings' to become final, such proposed amendment would then be 'agreed to' within the meaning of the constitution. But when a proposed amendment is 'passed' by the requisite vote in the Senate, such passage is subject to the right to reconsider it under the rules authorized by the constitution, and when such vote is, by the Senate, pursuant to 'the rules of its proceedings', duly determined to be reconsidered, and no provision of the constitution is thereby violated, the mere previous passage of the amendment by the Senate does not make the proposed amendment 'agreed to' within the meaning of the constitution.
>
> A right to reconsider action taken is an attribute of all deliberative bodies, and it is not forbidden to the Legislature by the constitution.
>
> * * * * * * * * *
>
> *A vote adopting a resolution and a vote duly taken to reconsider the vote of adoption, 'like positive and negative quantities in equation, destroy one another, and are as if they were expunged from the journals'.* Jefferson's Manual, Sec. XLIII. See also Ashton v. Rochester, 133 N. Y. 187, 30 N. E. 965, 28 Am. St. Rep. 619. The con-

stitutional mandate is that 'Each house *shall* [italics not added] determine the rules of its proceedings' (p. 57).

* * * * * * * *

As House Joint Resolution No. 222 was passed by the Senate subject to its rule that such passage might be reconsidered, the effect of the affirmative action taken by the Senate pursuant to its rules in declaring, as the result of a vote of 16 yeas and 13 nays, that the motion to reconsider the passage of the joint resolution 'was agreed to', is logically *to nullify and render ineffective the vote by which the joint resolution had passed the Senate;* so that, as a result of such reconsideration, the joint resolution not having been again agreed to, was and remained merely a pending matter in the Senate; and, consequently, the joint resolution was not 'agreed to by three-fifths of all the members elected to each house', within the meaning of that provision of the constitution which is a mandatory essential prerequisite to publication and to submission of the matter to the electors for approval or rejection as an amendment to the constitution" (Italics added). (p. 58.)

The principles enunciated in *Crawford* v. *Gilchrist, supra,* were followed by the Supreme Court of Florida in *State ex rel. West* v. *Butler,* 70 Fla. 102; 69 So. 771 (1915), in which it stated:

"A right to reconsider action taken is an attribute of all deliberative bodies, and it is not forbidden to the Legislature by the Constitution. When not otherwise provided by law, all deliberative bodies have a right during the session to reconsider action taken as they deem proper and it is the final result only that is to be regarded as the thing done" (p. 120).

In *Dust* v. *Oakman, supra,* the Attorney General on the relation of Dust instituted *quo warranto* proceedings against the respondent to test his title to the office of member of the Board of State Tax Commissioners. It appears that on January 3, 1900, the Governor of the State of Michigan transmitted to the Senate the nomination of the respondent. After the receipt of a favorable report from the committee

to which the nomination had been referred, the Senate voted to advise and consent to the nomination. At the same executive session, however, a motion was made to reconsider the vote, which motion prevailed. The Senate later refused to advise and consent to the appointment of the respondent. The motion to reconsider was made pursuant to a standing rule of the Senate which provided that such a motion could be made on the same day the vote was taken or within the next two days of actual session, provided, however, that no motion should be in order unless the bill, resolution, message, report, amendment or motion upon which the vote was taken was in the possession of the Senate. It will be noted that this rule is very similar to the standing rule of the Senate of the United States as existing prior to April 6, 1867. It is because of this proviso that the Court in its opinion points out that no action based upon the first vote had been taken prior to its reconsideration. Chief Justice Montgomery, in holding that a writ of ouster be granted, stated the crux of the matter as follows:

> "The question recurs whether, where an appointment or concurrence in an appointment is a subject of action by a deliberate body, that body may, by rules of its own, or acting under usual parliamentary rules, cast a vote upon the subject which is subject to reconsideration; for, if such course is permissible, *the appointment is not complete beyond recall until the power to reconsider has been cut off by the lapse of time.*
>
> Fortunately, authorities bearing upon this subject are not wanting, and it only remains to apply them." (Italics added.) (p. 721.)

See also:

State v. *New London Savings Bank,* 79 Conn. 141; 64 Atl. 5 (1906);

Conger v. *Gilmer,* 32 Cal. 75 (Supreme Court, 1867);

Reed v. *School Commission,* 176 Mass. 473; 57 N. E. 961 (1900);

Higgins v. *Curtis*, 39 Kan. 283; 18 Pac. 297 (1888);
State ex rel. Gouldey v. *City Council of Atlantic City*, 63 N. J. L. 537; 42 Atl. 852 (1899);
Stiles v. *City of Lambertville*, 73 N. J. L. 90; 62 Atl. 288 (1905);
Ashton v. *City of Rochester*, 133 N. Y. 187; 30 N. E. 965 (1892);
Commonwealth v. *Allen*, 128 Mass. 308 (1880);
People v. *Shawver*, 30 Wyo. 366; 222 Pac. 11, 23 (1924);
State v. *Foster*, 7 N. J. L. 123 (1823);
Red v. *City Council of Augusta*, 25 Georgia 386 (1857);
Luther S. Cushing, Law and Practice of Legislative Assemblies (Ninth ed. 1899), Sec. 1265.

It is sometimes stated that a legislative body cannot reconsider action taken by it, including the confirmation of an appointment. But from an examination of the decisions so stating, it appears invariably that the legislative body had already taken final action. If such is the case, of course, the appellant does not dispute the soundness of the decisions. We do not believe that counsel for the appellee will assert that the principle expounded in such cases is applicable to the case at bar for here it appears that the Senate under its rules never did take final and complete action on the appointment of the appellee. Cases of this nature are:

State ex rel. Childs v. *Wadhams*, 64 Minn. 318; 67 N. W. 64 (1896);
State ex rel. Whitney v. *Buskirk*, 40 N. J. L. 463 (1878);
In re Fitzgerald, 88 App. Div. 434, 82 N. Y. Supp. 811; Affd. 84 N. Y. Supp. 1125 (1903);
State ex rel. Coogan v. *Barbour*,* 53 Conn. 76; 22 Atl. 686 (1885);

* The court also considered that since the common council in appointing a prosecuting attorney was performing an executive function, it did not possess the right to reconsider.

Haight v. *Love*, 39 N. J. L. 14 (1876);
City of Kankakee v. *Small*, 317 Ill. 55; 147 N. E. 404 (1925);
Board of Education of Boyle County v. *McChesney*, 235 Ky. 692; 32 S. W. (2nd Series) 26 (1930);
State ex rel. Burdick v. *Tyrrell*, 158 Wis. 425; 149 N. W. 280 (1914).

In a few decisions relating to the right of a legislative body to reconsider action previously taken, there are dicta indicating that the right may be trimmed down or lost if notice of the action so taken has gone forward.

Baker v. *Cushman*, 127 Mass. 105 (1879);
Wood v. *Cutter*, *supra*;
State v. *Phillips*, 79 Me. 506; 11 Atl. 274 (1887);
Allen v. *Morton*, 94 Ark. 405; 127 S. W. 450 (1910);
State ex rel. Childs v. *Wadhams*, *supra*.

But in all of these cases it should be noted that the legislative body had no definite and explicit rules delimiting and conditioning the right to reconsider and indicating when its action became final. The Courts were consequently faced with the problem of inferring from the particular circumstances of each case whether the action should be reasonably construed as final and complete. And in making this determination, the Courts were apparently justified in considering as one element tending to show the finality of the action the fact that the legislative body had sent out the result of its action or had published it. That this is the approach of courts in such cases clearly appears from the opinion of the Court of Errors and Appeals of the State of New Jersey in *State ex rel. Whitney* v. *Buskirk*, *supra*, at page 467:

"It is clear that while the matter of acceptance was under consideration by the board of councilmen, it was the right of that body to reconsider its vote, and vote

as often as it saw fit upon the question, up to the time when, by a conclusive vote, accepted as such by itself, a determination was reached. *State* v. *Foster*, 2 Halst. 101; *State* v. *Justice*, 4 Zab. 413; *State, Shreve, pros.* v. *Crosley*, 7 Vroom, 428. *Such final determination may be evinced by a public promulgation of the result*, or by subsequent action inconsistent with the purpose of further review. Here the resignation presented by the mayor's message was voted upon and accepted, and afterward the nomination by the mayor of the defendant to fill the vacancy which would occur by this resignation was taken up by the board and by its deliberate vote confirmed." (Italics added.)

None of these decisions in which there appear dicta as to the sending out of notice of its action or publication thereof violate or impair the principles enunciated by the numerous authorities cited by us. In the case before this Court, the Senate had rules definitely regulating its right to reconsider even after a resolution had gone forward to the President. Such decisions, therefore, are irrelevant.

While the appellee has accordingly never been duly and regularly appointed to the office of member of the Federal Power Commission or duly and regularly designated its Chairman, nevertheless a court of law no doubt would recognize him as an officer *de facto* during his occupation. And all action in the discharge of his duties and powers as such is valid. Nor is this validity disturbed by his ouster at this time.

Hussey v. *Smith*, 99 U. S. 20, 24;
In re Manning, 139 U. S. 504, 506;
Ball v. *United States*, 140 U. S. 118, 129;
McDowell v. *United States*, 159 U. S. 596;
Ex parte Henry Ward, 173 U. S. 452.

But for the case before this Court, these principles do not directly concern us. Suffice it that since the Senate did not finally and irrevocably confirm the nomination of the appellee

as required by the Constitution, he is not in law entitled to office. The receipt of a commission, the taking of an oath and the assumption and discharge of the duties of the office did not vest rights in him or immunize him from ouster.

CONCLUSION.

The judgment of the Supreme Court of the District of Columbia should be reversed and the appellant should be granted a writ of *quo warranto* to oust and exclude the appellee from the office of member and Chairman of the Federal Power Commission.

Respectfully submitted,

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APPENDIX A.

Dates of Legislative and Executive Sessions of the Senate During the Third Session of Seventy-first Congress.

December	1,	1930.	Senate convened.
	2		Legislative session.
	3		Executive session.
	4		" "
	5-7		Senate not in session.
	8		Executive session.
	9		" "
	10		" "
	11		As in Executive Session.
	12		" " " "
			The Senate adjourned until December 15th.
	15		As in Executive session.
	16		Executive session.
	17		As in Executive Session.
	18		Executive session.
	19		" "
	20		" "
			The Senate adjourned until January 5, 1931.
January	5,	1931	Executive session.
	6		" "
	7		" "
	8		" "
	9		" "
	10		" "
	11	(Sunday)	No session.
	12		Executive session.
	13		" "
	14		As in Executive session.
	15		" " " "
	16		" " " "
	17		" " " "
	18	(Sunday)	No session.
	19		As in Executive session.
	20		" " " "
	21		" " " "
	22		Executive session.
	23		" "
	24		As in Executive session.
	25	(Sunday)	No session.
	26		As in Executive session.
	27		" " " "

	28		Executive session.
	29		As in Executive session.
	30		" " " "
	31		" " " "
February	1, 1931.	(Sunday)	No session.
	2		As in Executive session.
	3		" " " "
	4		Executive session.
	5		" "
	6		" "
	7		As in Executive session.
	8	(Sunday)	No session.
	9		As in Executive session.
	10		" " " "
	11		" " " "
	12		" " " "
	13		" " " "
	14		Executive session.
	15	(Sunday)	No session.
	16		As in Executive session.
	17		" " " "
	18		" " " "
	19		" " " "
	20		Executive session.
	21		" "
	22	(Sunday)	No session.
	23		As in Executive session.
	24		Executive session.
	25		" "
	26		As in Executive session.
	27		Executive session.
	28		" "
March	1, 1931.	(Sunday)	No session.
	2		Executive session.
	3		As in Executive Session.
	4		Legislative session.
			Senate adjourned *sine die*.